

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
DAR _____
Appeals Court No. 2023-P-0793

ERIC SALMONSEN
Plaintiff/Appellant

v.

ERIN HUBBELL

and

TWENTY ONE CORP
d/b/a Yong Shing
Defendants/Appellees

ON APPEAL FROM THE ALLOWANCE
OF SUMMARY JUDGMENT IN FAVOR OF TWENTY ONE CORP
BY THE WORCESTER SUPERIOR COURT

APPLICATION FOR DIRECT APPELLATE REVIEW

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None

REQUEST FOR DIRECT APPELLATE REVIEW

Plaintiff/Appellant Eric Salmonsens hereby requests this case be heard directly by the Supreme Judicial Court. Specifically, the Plaintiff seeks review of the Superior Court's allowance of the Defendant Twenty One Corp.'s motion for summary judgment on the Plaintiff's allegations of a dram shop violation and negligence. Plaintiff seeks to have this Court reconsider the standard of "visibly intoxicated at the service of the last drink" in dram shop cases as applied to injured third-parties, and to consider the propriety of a negligence claim against a liquor establishment for its service of alcohol while violating its own rules intended for the safety of third persons, which in this case led to a head-on automobile crash and severe injuries to the innocent Plaintiff.

PRIOR PROCEEDINGS

A complaint was filed on April 24, 2018, in the Worcester Superior Court by Mr. Salmonsens against Erin Hubbell alleging negligence and reckless conduct for injuries sustained in an automobile crash. The Plaintiff amended the complaint on August 28, 2018, adding Twenty One Corp., d/b/a/ Yong Shing ("Yong Shing") as a defendant and adding a dram shop count. After discovery was completed, the Plaintiff amended his complaint again. The second amended complaint added a count of negligence against Yong Shing, alleging that the employees failed to follow the corporation's own rules and guidelines for the service of alcoholic beverages

that, in part, required its employees to observe patrons for signs of intoxication from the time of entry into the bar until the customer's exit (Addendum A, page 23). Yong Shing's failure to follow its own rules for service of alcoholic beverages resulted in an intoxicated patron (Erin Hubbell) leaving the bar and driving away, causing a head-on automobile crash approximately one-half mile from the bar. This collision caused severe injuries to the Plaintiff.

Defendant Yong Shing filed a Motion for Summary Judgment arguing the claims against it should be dismissed by alleging no evidence was presented proving Ms. Hubbell was visibly intoxicated at the service of her last drink. The Worcester Superior Court (Sullivan, J.) allowed Yong Shing's Motion (Addendum C, page 46), reasoning that there was no "direct evidence of signs of intoxication at the time of service by the defendant." (Addendum C, page 51). The court also dismissed the negligence count, likening it to a Mode of Operation theory and ruling that "Mode of Operation has not been permitted as substitute evidence for visible signs of intoxication at the time of service in a liquor liability claim." (Addendum C, page 53). The trial court also denied the negligence claim on the basis that there was no evidence of Hubbell's visible intoxication while inside the bar.

STATEMENT OF FACTS
(Addendum E, page 70)

On March 24, 2017, Erin Hubbell and a friend entered the bar owned and operated by Twenty One Corp. d/b/a/ Yong Shing. (E, page 72, ¶11). Ms. Hubbell

(and her friend) ordered drinks at the bar. (E, page 73, ¶17). Mrs. Hubbell opened a tab at 8:01 pm and closed the tab at 8:44 pm. (E, page 83). Ms. Hubbell left the restaurant and got into her vehicle. (E, page 79, ¶34). Ms. Hubbell then drove onto Auburn Street and headed in a westerly direction. (E, page 79, ¶34). She drove one-half mile from the bar and was involved in an automobile crash with the plaintiff. (E, page 15).

At 8:55 PM, the Auburn Police received a call for an automobile crash on Auburn Street. (E, page 84). The crash occurred near 185 Auburn Street (E, page 84). The Yong Shing is located at 90 Auburn Street (E, page 84). Ms. Hubbell's vehicle crossed into the eastbound lane and struck Mr. Salmonsens's vehicle head-on. (E, page 85, ¶36 response). The police officer immediately noticed a "strong odor of alcoholic beverage coming from her breath, slurred speech, bloodshot glassy eyes, and appeared unsteady on her feet." (E, page 86). Ms. Hubbell admitted to operating the motor vehicle that struck Mr. Salmonsens. (E, page 86-87). She admitted to drinking a glass of wine and a Mai Tai, and explained that she had just come from the Yong Shing bar. (E, page 85). She told the police officer, "I shouldn't have been driving." (E, page 85). She refused field sobriety tests (E, page 81, ¶40) and a breathalyzer test (E, page 81, ¶40). The arresting officer formed the opinion that Ms. Hubbell was under the influence of intoxicating liquors and that she was visibly intoxicated at the scene of the crash. (E, page 86).

Ms. Hubbell was charged with Operating a Motor Vehicle Under the Influence of Intoxicating Liquors Causing Serious Bodily Injury and Operating a Motor Vehicle Negligently so as to Endanger the Lives and Safety of the Public. (E, page 86-87). Ms. Hubbell admitted to sufficient facts to these charges in the Worcester District Court. (E, page 85). At the hearing, Ms. Hubbell identified the last place she drank alcohol to be the Yong Shing. (E, page 86).

During the course of discovery, the owner of the bar was deposed as the Rule 30(b)(6) representative of Yong Shing (Twenty One Corp.). The bartender, Loo Meng (“Randy”) Cheah and the bouncer, Joseph Duocimo, were also deposed. They all testified about Yong Shing’s rules for service of alcoholic beverages at the bar and that they were required to watch patrons for signs of intoxication from the time they entered the premises until they left. The rules were intended to prevent customers from becoming intoxicated. The Rule 30(b)(6) representative testified that Yong Shing’s rules for the safe service of alcoholic beverages were meant to keep third persons safe, and it would constitute a failure of those rules if a customer became intoxicated.

Issues Presented

- 1. Whether a Bar Violating its Own Rules concerning the Safe Service of Alcohol Resulting in a Drunk Driver Colliding with an Automobile and Injuring a Third-Party Motorist can be found Negligent for Violating those Rules**

2. Whether a Third-Party Plaintiff may Satisfy the Notice Requirement to Bar Staff that a Customer is Intoxicated by using “Mode of Operation” Evidence as an Alternate Standard to the “Visibly Intoxicated at the Service of His/her Last Drink” Dram Shop Negligence Standard

ARGUMENT

1. Whether a Bar Violating its Own Rules concerning the Safe Service of Alcohol Resulting in a Drunk Driver Colliding with an Automobile and Injuring a Third-Party Motorist can be found Negligent for Violating those Rules

[T]he liability of the tavern is grounded on the common law of negligence....”

Gottlin v. Graves, 40 Mass. App. Ct. 155, 157 n.7 (1996). “It is only necessary for the plaintiff to prove that the defendant took a risk with respect to the plaintiff’s safety that a person of ordinary prudence would not have taken, and that the plaintiff suffered a resulting injury that was within the foreseeable risk.” *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 330 (1982).

“An employee’s violation of his employer’s rules, intended to protect the safety of third persons, is evidence of the employee’s negligence, for which the employer may be held liable.” *Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 138 (2006). *See also, Stevens v. Boston Elevated Ry. Co.*, 184 Mass. 476, 478 (1904) (“[T]he violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant’s disobedient servant for which the defendant is liable.”); and *O’Connor v. SmithKline Bio–Science Lab.*, 36 Mass.App.Ct. 360, 363

(2000) (“A reasonable fact finder could determine that [the defendant's] failure to assure that its policy was being followed constituted negligence.”).

Yong Shing had rules for the service of alcohol to keep patrons from becoming intoxicated and third parties, such as the plaintiff, safe from drunk drivers. Its corporate representative testified that if someone became intoxicated at the restaurant, it would constitute a failure of those rules. On March 24, 2017, Yong Shing employees failed to follow those rules and, as a result, Erin Hubbell left the bar intoxicated, drove one-half mile, crossed the centerline, and crashed into the Plaintiff’s vehicle. Hubbell told the police officer at the scene that she should not have been driving and later admitted to sufficient facts to Operating Under the Influence of Intoxicating Liquors Causing Serious Bodily Injury and Operating a Motor Vehicle Negligently so as to Endanger the Lives and Safety of the Public. (E, page 17-18).

The Plaintiff asserts that Yong Shing, like all other businesses, should be held liable for injuries caused by its negligent conduct arising from its employees’ violation of its rules for service of alcohol. The Plaintiff also asserts that this Court *has* attached liability for improper service of alcohol supported by evidence that the employees violated the bar’s rules for service of alcohol.

In *Tobin v. Norwood Country Club*, 422 Mass. 126 (1996), the country club relaxed its rules for service of alcohol which led to the intoxication and death of a 17-year-old who attended a party at the club. This Court ruled (at 140),

The evidence reveals that the club relaxed its normal procedures to accommodate a family party of one of its employees, something the club had never done before. Mercer allowed the Foleys to use the room free of charge, and more guests showed up than the club expected. In violation of club policies, Erwin sold multiple drinks on numerous occasions, and on at least three occasions permitted a minor to carry drinks from the bar. The record also indicates that on another occasion, the club had set up a bar in the function room so that the bartender could monitor the guests; on this night they decided not to. On other nights, the bartender walks through the function room; on this night only Moran entered the room. Finally, in violation of club rules, Moran drank at least three alcoholic drinks while on duty. Yet, the club and Erwin, working only for tips, maintained a financial incentive to serve as many drinks as were ordered.

This Court also found that,

[T]he supervisor of the bartenders stated that the bartender's responsibility is, whenever he or she has a chance, to stroll through the party and make sure everything is being done according to the club's policies. That the bartender failed to make this chance knowing that minors were present could have been considered negligent behavior by the jury. There was also testimony that it was the common policy and procedure of the club to make special arrangements for the supervision of minors to make sure that they would not be served alcoholic beverages. The club's assignment of Moran to this task when it was his family members that he was to supervise could have been considered negligent by the jury.

Id. at 140, fn. 12. Thus, this Court recognized in *Tobin* that a liquor establishment can be found negligent for its employees' failure to follow its own rules. There was no evidence that the decedent was intoxicated at the service of the last drink. The

only testimony was from the decedent's boyfriend that the decedent "seemed intoxicated toward the end of the party..." *Id.* at 128. This Court found sufficient evidence to overturn the trial court's ruling in favor of the country club when applying a standard different from the "visibly intoxicated at the service of the last drink" dram shop requirement. As is plain, this Court held the employer liable for the employees' negligence in their violation of the employer's rules meant for the safety of third persons.

The Plaintiff asserts in the present case that the trial court used the wrong standard of proof by inserting a requirement that co-defendant Hubbell had to be "visibly intoxicated" at the service of her last drink when dismissing the count based on negligence as a result of Yong Shing employees violating the company's rules for safe service of alcohol meant for the safety of third persons.

As stated above, Ms. Hubbell was observed by police to be visibly intoxicated at the crash scene only a few minutes after leaving the bar, co-defendant Hubbell's statements to police that she should not have been driving, and that Hubbell told the criminal court in her sworn testimony that her last drink was at Yong Shing is sufficient to allow a jury to determine whether Yong Shing was negligent in its service of alcohol and should be held liable for injuries to the Plaintiff.

2. Whether a Third-Party Plaintiff may Satisfy the Notice Requirement to Bar Staff that a Customer is Intoxicated by using “Mode of Operation” Evidence as an Alternate Standard to the “Visibly Intoxicated at the Service of His/her Last Drink” Dram Shop Negligence Standard

In *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982), this Court overruled the requirement in the *Dimond*¹ case which required the plaintiff prove the bar knew or should have known that the intoxicated patron was going to drive an automobile when he/she left the bar. In support of that decision to overturn the requirement, This Court ruled,

Dimond's apparent requirement of scienter has been aptly criticized as weakening the liability of establishments that serve liquor on their premises ‘precisely where the social interest is strongest -- the area of driving under the influence of alcohol.’² *We see no reason why the recovery by those injured by that driving should turn on such fortuities as the ability of such injured persons to prove that the defendant knew or should have known the particular person who caused the injury was going to use a motor vehicle.*

Id. at 330 (emphasis added). This court then announced that to prove the claim that a bar negligently overserved a patron, the plaintiff must introduce evidence of visible intoxication at the service of the last drink. *Id.* at 327. This now meant that proving a bar overserved a patron turns on the *fortuities* of the plaintiff proving that the defendant bar (in which the plaintiff was never present) saw or should have seen that the customer was visibly intoxicated at the service of the last drink. The “visibly

¹ *Dimond v. Sacilotto*, 353 Mass. 501 (1968)

² *Quoting*, Comment, 48 B.U.L. Rev. 502, 512 (1968).

intoxicated” rule was created to show that the bar “was on notice that it was serving alcoholic beverages to an intoxicated patron....” *Id.* at 328.

This Court has recognized that a business may also be placed on notice of its negligent behavior by using “Mode of Operation” in place of witness testimony such as the length of time the hazardous condition existed that caused the injury. *See Sheehan v. Roche Bros. Supermarkets*, 448 Mass. 780 (2007). Under this approach, Mode of Operation “removes the burden on the victim... to prove that the owner or the owner's employees had actual or constructive notice of the dangerous condition or to prove the exact failure that caused the accident.” *Id.* at 790.

In a claim alleging negligent service of alcohol, the Mode of Operation standard would remove the burden of the plaintiff who was not in the defendant bar to prove the direct knowledge of the bar employees who were serving the drunk driver. “It is ‘unjust to saddle the plaintiff with the burden of isolating the precise failure’ that caused an injury, particularly where a plaintiff's injury results from a foreseeable risk of harm stemming from an owner's mode of operation.” *Id.* at 788, quoting *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426 (1966). Drunk drivers are a foreseeable risk of serving alcohol. *See Adamian v. Three Sons, Inc.*, 353 Mass. 498 (1968).

Although adopting Mode of Operation to negligent service of alcohol is a matter of first impression in Massachusetts, “this court's role in these circumstances

has not been limited in the manner that the other State courts have been. Partially as a result of the *Adamian* decision, this court has maintained its role in the development of the law in this area.” *Tobin v. Norwood Country Club*, 422 Mass. 126, 134 n.7 (1996).

Addendum B (page 36) contains the report of the plaintiff’s expert, a former investigator for the Alcoholic Beverage Control Commission (ABCC), with his observations of the Defendant’s service of alcohol to its patrons.³

It is my opinion that the Twenty One Corp employees’ violations of the employer’s rules for service of alcoholic beverages, which were intended for the protection of third parties, greatly increased the risk of harm to the general public. These violations resulted in allowing Ms. Hubbell, who was impaired by alcohol from the defendant’s bar, to drive from the restaurant and collide with Mr. Salmonsens’ vehicle.

It is my opinion that the true, observed method of operation of Twenty One Corp for service of alcoholic beverages created a high likelihood that customers would become impaired by alcoholic beverages while patronizing the bar and then drive from the bar under the influence of the consumed alcoholic beverages. As stated above, the employees disregarded the company’s stated rules for safe service of alcoholic beverages and the management did not intervene and correct the violations.

The expert’s report described observations made by the expert on two dates (April 19, 2019, and May 5, 2019). It is obvious that Yong Shing’s “Mode of Operation” regarding its service of alcoholic beverages greatly increased the risk of

³ Although the inspection occurred after this incident, the Rule 30(b)(6) deponent and the bartender both testified that between the date of the incident (March 24, 2017) and their depositions (July 24, 2019), the bar had not changed the manner in which they served alcohol. The expert’s inspection occurred between those dates.

harm to patrons and the motoring public, and its “Mode of Operation” should have put them on notice of that increased risk. The employees sold high alcohol content drinks at a fast pace and paid no attention to the state of sobriety of the patrons. (Addendum B, page 43). Yong Shing’s deliberate indifference to overserving patrons was glaring and the crash in this case was a direct result of their negligent service of alcoholic beverages.

REASONS FOR DIRECT APPELLATE REVIEW

Plaintiff asserts that the questions presented in this appeal, holding a bar negligent for violating its own rules and the use of Mode of Operation in place of the visibly intoxicated at the service of the last drink, are novel questions of the law. Plaintiff also asserts that the public interest in holding bars liable for allowing drivers to become intoxicated and travel the roads of the Commonwealth are of vital public interest. These issues are of such importance that justice requires a final determination by this Court.

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Certification

The Appellant certifies that this Application for Direct Appellate Review complies with Massachusetts Rules of Appellate Procedure 11, 16(a)(3), 20 and 21.

- The appellant has used Times New Roman, 14-point font, using Microsoft Word (version 2306) as part of the Microsoft Office 365 software.
- All words were counted under the heading of Argument using the word count tool in Microsoft Office. No words were excluded. The argument section contains 1,973 words.

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COMMONWEALTH OF MASSACHUSETTS
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DAR Number _____
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ERIC SALMONSEN
Plaintiff/Appellant

v.

ERIN HUBBELL

and

TWENTY ONE CORP
d/b/a Yong Shing
Defendants/Appellees

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I certify, under the pains and penalties of perjury, that on this date of August 2, 2023, I have made service of a copy of the following documents:

Application for Direct Appellate Review

Upon the attorney of record for each party, or if the party has no attorney, then I made service directly to the self-represented party, by email to:

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Addendum A

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

Superior Court
Civil Action No. 1885CV0630-D

<p>Eric Salmonsens <i>Plaintiff</i></p> <p>v.</p> <p>Erin Hubbell and Twenty One Corp d/b/a Yong Shing Restaurant <i>Defendants</i></p>
--

SECOND AMENDED COMPLAINT WITH JURY DEMAND

1. The plaintiff, Eric Salmonsens, is a resident of Worcester, Worcester County, Massachusetts.
2. Upon information and belief, the defendant, Erin Hubbell, is a resident of 17 Otis St., Auburn, Worcester County, Massachusetts.
3. Upon information and belief, Twenty One Corp., is a Massachusetts Corporation, organized on March 15, 1989, has a principal place of business at 90 Auburn Street, Auburn, Worcester County, Massachusetts, and does business under the name of the Yong Shing Restaurant at the same address.

General Allegations

4. On March 24, 2017, Ms. Hubbell was operating her vehicle in an easterly direction on Auburn Street in the town of Auburn.
5. In the area of Bryn Mawr Ave., Ms. Hubbell's vehicle crossed the double yellow center line traveling into the westbound lane.
6. The plaintiff was operating his vehicle on Auburn St. in Auburn in a westerly direction.

7. Ms. Hubbell's vehicle struck the vehicle driven by the plaintiff. (See Exhibit 1)
8. Ms. Hubbell's vehicle struck the plaintiff's vehicle in a head-on type fashion causing major damage to both vehicles.
9. Ms. Hubbell had just left the Yong Shing Restaurant (Owned and Operated by Twenty One Corp.) where she consumed alcoholic beverages.

Count I
(Negligence against Hubbell)

10. The plaintiff repeats the allegations in this complaint.
11. Ms. Hubbell failed to operate her motor vehicle in a reasonable manner thereby causing property damage and personal injury to the plaintiff.
12. Ms. Hubbell failed to use care in the operation of her motor vehicle thereby causing property damage and personal injury to the plaintiff.
13. Ms. Hubbell, through her acts and omissions, failed to stay in her own lane and crossed into the plaintiff's travel lane thereby causing property damage and personal injury to the plaintiff.
14. Ms. Hubbell drove her vehicle across the double yellow center lines in the road, improperly entered Mr. Salmonsens lane and struck his vehicle.
15. As a result of Ms. Hubbell's negligent operation of her motor vehicle, the plaintiff was seriously injured, incurred in excess of \$2,000 in medical bills that were reasonable and necessary in the treatment of his injuries, and, among other things, suffered fractured bones, and experience pain and suffering.

Wherefore, the plaintiff seeks a judgment against the defendant for compensatory damages, interest, costs and any other relief this Court deems just.

Count II
(Reckless Conduct against Hubbell)

16. The plaintiff restates and incorporates the allegations in this complaint.
17. Just prior to this crash, Ms. Hubbell had consumed alcoholic beverages at the defendant restaurant.
18. After consuming those alcoholic beverages, Ms. Hubbell operated her vehicle in an impaired manner.
19. At the scene of the crash, Ms. Hubbell was placed under arrest by the Auburn Police Department for OUI-L. (Exhibit 2).
20. On March 14, 2018, Ms. Hubbell pled guilty to a number of charges, including OUI-L (causing serious bodily injury) in the Worcester District Court (See Exhibit 3).
21. By operating her motor vehicle while under the influence of intoxicating liquors, Ms. Hubbell's conduct was not only negligent, but reckless.
22. Ms. Hubbell's impairment due to alcoholic beverages and her failure to operator vehicle in a reasonable manner was the proximate cause of the crash that injured Mr. Salmonsens.
23. Ms. Hubbell's impairment due to alcoholic beverages and her failure to operator vehicle in a reasonable manner was reckless conduct.
24. Upon entering a plea in the Worcester District Court, Ms. Hubbell stated that the location of her last alcoholic beverage was at the Yong Shing restaurant in Auburn.
25. It was at that restaurant, she ingested her last alcoholic beverage before driving on Auburn Street and colliding with Mr. Salmonsens

Wherefore, the plaintiff seeks a judgment against the defendant for compensatory damages, interest, costs and any other relief this Court deems just.

Count III
(Dram Shop Violation against Twenty One Corp)

26. The plaintiff restates and incorporates the allegations in this complaint.
27. Twenty One Corp does business as the Yong Shing restaurant
28. Yong Shing is a licensed seller of alcoholic beverages in Auburn, Massachusetts.
29. On March 24, 2017, Yong Shing sold alcoholic beverages to Ms. Hubbell while at its restaurant.
30. These drinks were sold to Ms. Hubbell by the bartender at the Yong Shing Restaurant.
31. As a result of the consumption of this amount of alcohol, Ms. Hubbell became visible intoxicated prior to leaving the establishment and operating the motor vehicle.
32. Yong Shing employees knew or should have known that the consumption of this excess amount of alcohol would result in dangerous driving.
33. An agent, servant, employee or a person for whom Yong Shing was responsible for the service of alcoholic beverages to Ms. Hubbell on the evening of March 24, 2017.
34. Ms. Hubbell became highly intoxicated as a result of Yong Shing employees over-serving her alcoholic beverages.
35. Yong Shing violated statutory and common law by serving alcoholic beverages to an intoxicated person.
36. Ms. Hubbell drove a motor vehicle in a visibly intoxicated state, severely injuring Mr. Salmonsens.
37. The attached exhibits and affidavit pursuant to § 60J are incorporated by reference. (Exhibit 4).
38. The deposition of Spiros Kaperonis (Exhibit 5) is also incorporated into this complaint and the § 60J affidavit.

39. Officer Kaperonis testified that Ms. Hubbell was visibly intoxicated at the scene of the crash.
40. Mr. Salmonsén's earning capacity was diminished and he incurred medical bills due to the injuries he suffered in this incident.
41. Mr. Salmonsén suffered great pain as a result of her injuries and required surgical repair.
42. Yong Shing knew or should have known that Ms. Hubbell was becoming intoxicated and refused service.

Wherefore, plaintiff seeks a judgment against Twenty One Corp. d/b/a/ Yong Shing for compensatory damages, interest, costs, attorney's fees, and any other relief this Court deems just, as well as with any or all of these counts.

Count IV
Negligence against Twenty One Corp.

43. The plaintiff restates and incorporates the allegations in this complaint.
44. Twenty One Corp set up rules/policies/guidelines to stop patrons from becoming intoxicated.
45. Twenty One Corp's goal was to not have an intoxicated patron drive away from its restaurant.
46. Twenty One Corp's employees followed these rule/policies/guidelines to keep patrons from becoming impaired automobile operators.
47. Twenty One Corp set these rules for the protection of third parties, such as motorists on public ways.
48. Twenty One Corp's employees would observe the patrons, from the moment of entry into the restaurant until the patron left, looking for signs of intoxication.

49. The rules/policies/guidelines were adopted, in part, to protect patrons and motoring public from encountering a patron who was operating a motor vehicle while impaired by alcohol served by Twenty One Corp.
50. The employees violated their employer's rules/policies/guidelines by allowing the defendant Erin Hubbell to leave the restaurant while impaired by alcohol.
51. Due to the failure of the Twenty One Corp's employees, Ms. Hubbell got into her vehicle and drive from the restaurant in an impaired state.
52. As a result of the employees' negligence, Ms. Hubbell's impairment caused her to crash into the plaintiff's vehicle causing serious injury to the plaintiff.
53. The employees failed to act reasonably in allowing an impaired person to drive from the restaurant, in violation of the employer's rules.
54. The employees violated the rules of Twenty One Corp by serving the defendant Hubbell alcohol to the point of impairment, allowed her to leave while impaired, which allowed her to drive from the restaurant in an impaired state which caused a collision and caused severe injury to the plaintiff.
55. As a result of Twenty One Corp's negligence, Mr. Salmonsens was severely injured.

Wherefore, plaintiff seeks a judgment against Twenty One Corp. d/b/a/ Yong Shing for compensatory damages, interest, costs, attorney's fees, and any other relief this Court deems just, as well as with any or all of these counts.

THE PLAINTIFF DEMANDS A TRIAL BY JURY

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Dated: April 30, 2021

EXHIBIT B



Arrest Report

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Arrest #: 17-154-AR
Call #: 17-4787

Date/Time Reported: 03/24/2017 @ 2055
Arrest Date/Time: 03/24/2017 @ 2115
Booking Date/Time: 03/24/2017 @ 2129

OBTN: TAUB201700154

Reporting Officer: Patrolman Spiros Kaperonis
Assisting Officer: Patrolman Daniel Dyson
Booking Officer: Patrolman Daniel Dyson



Released: 03/25/2017 @ 1245

Signature: _____

DEFENDANT(S)	SEX	RACE	AGE	SSN	PHONE
HUBBELL, ERIN ANN 17 OTIS ST AUBURN MA 01501-3419	F	W	33	[REDACTED]	[REDACTED]

Military Active Duty: N
 HEIGHT: 500 WEIGHT: 120 HAIR: BROWN EYES: BROWN
 BODY: MEDIUM COMPLEXION: MEDIUM
 DOB: [REDACTED] PLACE OF BIRTH: WORCESTER MA
 LICENSE NUMBER: MA 899383008 ETHNICITY: NOT HISPANIC
 PCF #: NONE

[CONTACT INFORMATION]

Home Phone (Primary) 774-289-8526

[APPEARANCE]

GENERAL APPEARANCE: ORDERLY

SHIRT: PULLOVER - LONG SLEEVE
SWEATERS/COATS/JACKETS: MEDIUM LENGTH
PANTS/SKIRT: JEANS-COLOR
SHOE: JOGGING SHOES
GLASSES WORN: NO

TATTOOS: TAT BACK(FLOWERS)

[FAMILY/EMPLOYMENT INFORMATION]

MARITAL STATUS: MARRIED

FATHER'S NAME: CASEY, MICHAEL
MOTHER'S NAME: UHLANN, LESLEY

EMPLOYER/SCHOOL: YANKEE DINER
CHARLTON MA 01507

Arrest Report

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Arrest #: 17-154-AR
Call #: 17-4787

DEFENDANT(S) SEX RACE AGE SSN PHONE

[RIGHTS/BOOKING CHECKS]

RIGHTS ADVISED BY: Patrolman Daniel P Dyson DATE/TIME: 03/24/2017 @ 2131
PHONE USED: Y PHONED DATE/TIME: 03/24/2017 @ 2205
ARRESTEE SECURED: Y 03/24/2017 2215
ARRESTEE CELL #: 5

FINGERPRINTED: Y
PHOTOGRAPHED: Y
VIDEO: YES
SUICIDE CHECK: Performed
PERSONS: State&Federal
NCIC VEHICLE CHECK: Not Performed
INJURY OR ILLNESS: N

OFFENSE(S) ATTEMPTED TYPE

LOCATION TYPE: Highway/Road/Alley/Street Zone: Sector 3
185 AUBURN ST
AUBURN MA 01501

- 1 OUI LIQUOR & SERIOUS INJURY N Misdemeanor
90/24L/D 90 24L
OCCURRED: 03/24/2017 2055
REFER TO CITATION#: 7924278
- 2 OUI LIQUOR N Misdemeanor
90/24/J 90 24
OCCURRED: 03/24/2017 2055
REFER TO CITATION#: 7924278
- 3 NEGLIGENT OPERATION OF MOTOR VEHICLE N Misdemeanor
90/24/E 90 24
OCCURRED: 03/24/2017 2055
REFER TO CITATION#: 7924278
- 1 MARKED LANES VIOLATION N Violation
89/4A 89 4A
OCCURRED: 03/24/2017 2055
REFER TO CITATION#: 7924278
FINE: 105.00
- 5 ALCOHOL FROM OPEN CONTAINER IN MV DRINK N Violation
90/24I 90 24I
OCCURRED: 03/24/2017 2055
REFER TO CITATION#: 7924279
FINE: 505.00

PERSON(S) PERSON TYPE SEX RACE AGE SSN PHONE

SALMONSEN, ERIC M
13 JUNIPER DR
MILLBURY MA 01527
DOB: [REDACTED]

PARTICIPANT M W 45 [REDACTED]

INJURIES: Possible Internal Injuries

ADDITIONAL ASSISTING OFFICERS

Patrolman Keith Chipman

NARRATIVE FOR PATROLMAN SPIROS KAPERONIS

Ref: 17-154-AR

On Friday March 24, 2017 at approximately 2055 hours while on a uniform patrol in cruiser #20, Dispatch advised me to respond to Auburn St. which is a public way in the Town of Auburn for a two car motor vehicle accident.

Upon my arrival I observed two vehicle's in the roadway. The first one was a white colored Chevrolet Traverse bearing Massachusetts registration (#1FL799), with the female operator still in the vehicle. She was identified with her Massachusetts driver's license as HUBBELL, ERIN ([REDACTED]).

The other vehicle was an orange Nissan Maxima bearing Massachusetts registration (#982XG2), with the male operator stuck in the vehicle later identified as SALMONSEN, ERIC. The male operator appeared to have severe head trauma, and was bleeding from the face.

I then assessed the crash, and it appeared that the Chevrolet Traverse was traveling westbound on Auburn St., and swerved into the eastbound lane and struck the Nissan Maxima head on. I also spoke with two witnesses identified as Donna Hunter and Lais Milioli. They stated that as they were traveling behind the Nissan Maxima., they observed the Chevrolet Traverse swerve into the other lane and crash head on into the Nissan Maxima. **Note! Please refer to Officer Chipman's accident report (#17-97-ac).**

As the Auburn Fire Department was rendering medical care to SALMONSEN, I spoke with HUBBELL. I immediately detected a strong odor of an alcoholic beverage coming from her breath, slurred speech, blood shot glassy eyes, and appeared to be unsteady on her feet. I asked her if she had been drinking tonight, and she stated "yes". She further stated that she was coming from the Yong Shing. When I asked her how many drinks she had, she stated "glass of wine and a Mii Tai". She stated that she "shouldn't have been driving". I then asked her if she was driving, and if there was anyone else in the vehicle. She stated that she was the only one in the car and she was driving.

I then asked her if she would take a series of field sobriety test, and she stated "no". After speaking with HUBBELL, I formed the opinion that she was operating a motor vehicle on a public way while under the influence of alcohol. She was placed in custody and issued a Massachusetts Uniform Citations #R7924278 and #R7924279 charging her with 90/24 OUI alcohol, 90/24 OUI alcohol with serious injury, 90/24 negligent operation of a motor vehicle, and 89/4A marked

NARRATIVE FOR PATROLMAN SPIROS KAPERONIS

Ref: 17-154-AR

anes.

I then spoke with Officer Chipman who advised me that he inventoried both vehicles before they were towed from the scene. As he was inventorying the Chevrolet Traverse, he recovered two 50 ml bottles of Dr. McGillicuddy's from the center console. One bottle was empty and one bottle was 1/3 full. Note! Dr. McGillicuddy's is 24% alcohol by volume. HUBBELL was also charged with 90/241 open container of alcohol in vehicle.

HUBBELL was placed in double locked handcuffs in the rear of the cruiser and was transported back to the Auburn Police Department. She was immediately advised of her OUI rights and was given the opportunity to take the breathalyzer test. After advising her of the OUI rights HUBBELL refused to take the breathalyzer test. She was then photographed, fingerprinted and was later jailed.

Respectfully Submitted,

Ptln.#56 Spiros G. Kaperonis

EXHIBIT C

CRIMINAL COMPLAINT ORIGINAL		DOCKET NUMBER 1762CR002155	NO. OF COUNTS 5	Trial Court of Massachusetts District Court Department
DEFENDANT NAME & ADDRESS Erin Ann Hubbell 17 Otis Street Auburn, MA 01501			COURT NAME & ADDRESS Worcester District Court 225 Main Street Worcester, MA 01608 (508)831-2010	
DEFENDANT DOB [REDACTED]	COMPLAINT ISSUED 03/27/2017	DATE OF OFFENSE 03/24/2017	ARREST DATE 03/24/2017	
OFFENSE CITY / TOWN Auburn	OFFENSE ADDRESS Auburn Street		NEXT EVENT DATE & TIME 03/27/2017 08:55 AM	
POLICE DEPARTMENT AUBURN PD		POLICE INCIDENT NUMBER 17-154-AR		NEXT SCHEDULED EVENT Arraignment
OBTN TAUB201700154	PCF NUMBER 5420333	DEFENDANT XREF ID 43220028		ROOM / SESSION 1st Session, Ctrm 14

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.

COUNT	CODE	DESCRIPTION
1	90/24L/D	OUI-LIQUOR OR .08% & SERIOUS INJURY c90 §24L(2)
<p>On 03/24/2017 did operate a motor vehicle upon a way, as defined in G.L. c.90, §1, or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licensees, with a percentage, by weight, of alcohol in his or her blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, and by such operation did cause serious bodily injury to a person, Eric Salmosen, in violation of G.L. c.90, §24L(2).</p> <p>PENALTY: jail or house of correction for not more than 2½ years; or not less than \$3000 fine; or both; plus \$50 Victims of Drunk Driving Assessment; RMV shall revoke license for 2 years, or for life after prior OUI. §24Q: Defendants with a blood alcohol level of .20%, or who have previously been convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program, must also attend alcohol or drug assessment by DPH or other court-approved program.</p>		
2	90/24/J	OUI-LIQUOR OR .08% c90 §24(1)(a)(1)
<p>On 03/24/2017 did operate a motor vehicle upon a way, as defined in G.L. c.90, §1, or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licensees, with a percentage, by weight, of alcohol in his or her blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, in violation of G.L. c.90, §24(1)(a)(1).</p> <p>PENALTY: imprisonment for not more than 2½ years; or not less than \$500, not more than \$5000 fine; or both imprisonment and fine; plus \$50 Victims of Drunk Driving Assessment; plus (if OUI \$250 Head Injury Assessment; no filing or continuance without a finding; and license revoked for 1 year. §24C: Defendants with a blood alcohol level of .20% must also attend alcohol or drug assessment by DPH or other court-approved program. §24D alternative disposition: If defendant eligible, after guilty finding or continuance without a finding, judge may allow as alternative: probation not more than 2 years, plus driver alcohol or controlled substance abuse education program, or alcohol or controlled substance abuse treatment or rehabilitation program, or both, plus its program fee, plus \$250 assessment for apprehension, treatment and rehabilitation programs, plus \$50 Victims of Drunk Driving Assessment, plus (if OUI \$250 Head Injury Assessment, plus license suspended for not less than 45 days, not more than 90 days (or for 210 days, if defendant under age 21 on offense date. Defendants aged 17-21 with a blood alcohol level of .20% or more must attend a "14-day second offender in-home program."</p>		
3	90/24/E	NEGLIGENT OPERATION OF MOTOR VEHICLE c80 §24(2)(a)
<p>On 03/24/2017: did operate a motor vehicle upon a way, as defined in G.L. c.90, §1, or in a place to which the public has a right of access, or in a place to which members of the public have access as invitees or licensees, negligently, so that the lives or safety of the public might be endangered, in violation of G.L. c.90, §24(2)(a).</p> <p>(PENALTY: imprisonment for not less than 2 weeks, not more than 2 years; or not less than \$20, not more than \$200, plus \$250 Head Injury Treatment Services Trust Fund surcharge; or both imprisonment and fine; subsequent offense may not be filed or continued without a finding except upon motion and judge's certificate that such is in the interests of justice; RMV may (and shall unless judge recommends otherwise) revoke license for 60 days or, for subsequent offenses within 3 years, for 1 year, subject to reinstatement after investigation; RMV may revoke registration if defendant is owner or has exclusive control of vehicle. For violations on and after 3/31/07, RMV shall suspend junior operator's license or learner's permit 90 days for first offense and 1 year for subsequent offense; junior operator must also complete attitudinal change program.)</p>		

SIGNATURE OF COMPLAINANT <i>X Paul Inbar</i>	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK <i>X [Signature]</i>	DATE 3-27-17
NAME OF COMPLAINANT	CLERK-MAGISTRATE/ASST. CLERK <i>X [Signature]</i>	DATE

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

CRIMINAL COMPLAINT ADDITIONAL COUNTS	DOCKET NUMBER 1762CR002155	NO. OF COUNTS 5	Trial Court of Massachusetts District Court Department 
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COUNT	CODE	DESCRIPTION
4	89/4A	MARKED LANES VIOLATION * c89 §4A

On 03/24/2017, while operating upon a way that had been divided into lanes: (1) did fail to so drive that his or her vehicle was entirely within a single lane; or (2) did move his or her vehicle from the lane in which he or she was driving without having first ascertained that such movement could be made with safety; or (3) did operate his or her motorcycle abreast of more than one other motorcycle; or (4) did fail to operate his or her motorcycle single file when passing; or (5) did on a motorcycle pass another motor vehicle other than another motorcycle within the same lane, in violation of G.L. c.89, §4A. (CIVIL ASSESSMENT from §§: \$100.)

NOTE: THIS IS A CIVIL MV INFRACTION, SET FORTH HERE FOR PROCEDURAL PURPOSES ONLY.

5	90/24I	ALCOHOL IN MV, POSSESS OPEN CONTAINER OF * c90 §24I
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NOTE: THIS IS A CIVIL MV INFRACTION, SET FORTH HERE FOR PROCEDURAL PURPOSES ONLY. On 03/24/2017, upon a way, as defined in G.L. c.90, §1, or in a place to which the public had a right of access, or upon a way or in a place to which members of the public had access as invitees or licensees, did possess an open container of alcoholic beverage in the passenger area of a motor vehicle, as such terms are defined in G.L. c.90, §24I, in violation of G.L. c.90, §24I. (CIVIL ASSESSMENT: \$500.)

A TRUE COPY ATTEST:

Ardena O'Brien
 ASSISTANT CLERK

CRIMINAL DOCKET	DOCKET NUMBER 1762CR002155	NO. OF COUNTS 5	Trial Court of Massachusetts District Court Department
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DEFENDANT NAME AND ADDRESS Erin Ann Hubbell 17 Otis Street Auburn, MA 01501	DOB [REDACTED]	GENDER Female	COURT NAME & ADDRESS Worcester District Court 225 Main Street Worcester, MA 01608
	DATE COMPLAINT ISSUED 03/27/2017		
	PRECOMPLAINT ARREST DATE 03/24/2017		INTERPRETER REQUIRED

COUNT	CODE	OFFENSE DESCRIPTION	OFFENSE DATE
1	90/24L/D	OUI-LIQUOR OR .08% & SERIOUS INJURY c90 §24L(2)	03/24/2017
2	90/24/J	OUI-LIQUOR OR .08% c90 §24(1)(a)(1)	03/24/2017
3	90/24/E	NEGLIGENT OPERATION OF MOTOR VEHICLE c90 §24(2)(a)	03/24/2017
4	89/4A	MARKED LANES VIOLATION * c89 §4A	03/24/2017
5	90/24I	ALCOHOL IN MV, POSSESS OPEN CONTAINER OF * c90 §24I <i>3/15 bail posted</i>	03/24/2017

DEFENSE ATTORNEY A.H. Salerno (ARR) <i>6-15-18 Arr Salerno</i>	OFFENSE CITY/TOWN Auburn	POLICE DEPARTMENT AUBURN PD
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DATE & JUDGE	DOCKET ENTRY	DATE & JUDGE	FEES IMPOSED
3-27-17	<input checked="" type="checkbox"/> Attorney appointed (278 R-214) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail <i>500 3-27-17</i> <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (278 §58A)		Counsel Fee (211D § 2A(2)) <input type="checkbox"/> WAIVED Counsel Contribution (211D § 2) <input type="checkbox"/> WAIVED Default Warrant Fee (278 § 30(1)) <input type="checkbox"/> WAIVED Default Warrant Arrest Fee (278 § 30 (2)) <input type="checkbox"/> WAIVED
<i>P. LoConti</i>	Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (278 §58B) <input type="checkbox"/> Right to bail to review (278 §58) <input type="checkbox"/> Right to drug exam (111E § 10) <input type="checkbox"/> Inquiry made by Court under 278 § 56A	<i>GINSBURG, J.</i>	Probation Supervision Fee (278 § 87A) <input type="checkbox"/> WAIVED Bail Order Forfeited
	Abuse Allegation: <input type="checkbox"/> C278 § 56A form filed by Commonwealth <input type="checkbox"/> Allegation of abuse under C278 § 56A found <input type="checkbox"/> No allegation of abuse under C278 § 56A found	<i>3.14.18</i> <i>GINSBURG, J.</i>	Advised of right to jury trial: <input checked="" type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive Advised of trial rights as pro se (Dist. Ct. Supp.R.4) Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)

SCHEDULING HISTORY					
NO.	SCHEDULED DATE	EVENT	RESULT	JUDGE	TAPE START/STOP
1	03/27/2017	Arraignment	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>P. LoConti</i>	
2	5-4-17	<i>PTCH</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>ALLARD-MADAUS, J.</i>	
3	6-19-17	<i>PCH</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		
4	8-1-17	<i>PCH</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		
5	9-11-17	<i>CE</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>DELEGRINI, J.</i>	
6	10-23-17	<i>CE</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>DESPOTOPULOS, J.</i>	
7	12-4-17	<i>CE</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>SPRING</i>	
8	1-19-18	<i>CE</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd	<i>MCGUIGAN, J.</i>	
9	3-1-18	<i>CE</i>	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd	<i>MCGUIGAN, J.</i>	
10	3-14-18	<i>TAD</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd <i>27</i>	<i>GINSBURG, J.</i>	<i>2:25</i>

APPROVED ABBREVIATIONS
 ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection GTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRB = Status review
 SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWP = Continuance without hearing scheduled to terminate PRO = Probation scheduled to terminate
 OFTA = Defendant failed to appear & was defaulted WAR = Warrant based WARD = Default warrant issued VSR = Verdict or default warrant recalled PVH = probation revocation hearing.

A TRUE COPY ATTEST:	CLERK-MAGISTRATE / ASST CLERK <i>[Signature]</i>	TOTAL NO. OF PAGES	ON (DATE)
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Addendum B

REPORT

This investigation is the result of an automobile crash which occurred on March 24, 2017, at 8:55 pm, when a female patron identified as Ms. Erin Ann Hubbell left the Yong Shing Restaurant after consuming at least one alcoholic beverage. She drove from the restaurant onto Auburn Street for approximately one-half mile. Her vehicle then crossed the center lane markings and into the travel lane of an oncoming vehicle operated by Mr. Eric Salmonsens causing him to sustain severe personal injuries. Ms. Hubbell was arrested at the scene by Auburn Police Officers and charged with OUI-L, to which she later admitted in court.

I was asked to review the operations and practices surrounding the service of alcohol, monitoring of patrons for signs of intoxication, and strategies for dealing with intoxicated patrons, of Yong Shing Restaurant, 90 Auburn Street, Auburn to determine the manner in which the bar and lounge business was operated.

Observations

On Friday, April 5, 2019 at 6:00pm, I departed my office to travel to the Yong Shing Restaurant. Prior to arriving at the restaurant I first drove to the site of the crash between the parties which was located in the vicinity of 185 Auburn Street, Auburn. This location was on a straight section of roadway just one-half mile from the Yong Shing Restaurant.

After viewing the crash scene I drove to the Yong Shing Restaurant. While in the parking lot I found the parking lot of the restaurant to be very crowded with no parking spaces to be found without having a valet park your car.

Once inside I sat first at a table, and then at the bar when two stools opened up 15-20 minutes later. While at the bar I spoke to one of the bartenders later identified as Chad. I then ordered a soft drink and watched Chad as he "free poured" a Mai Tai nearly to the top of the large rocks glass with Rum before pouring in a premix for the final ½ to 1 inch topping off the glass. This was an excessive amount of alcohol for that drink.

I observed the bartenders (Chad and a female bartender), as well as a second male bartender later identified as Randy, mix their drinks using a free pour rather than a shot glass to measure out the alcohol being added to drinks. (This greatly increases the risk of excess alcohol being poured into a customer's drink.) Randy is also identified as the bartender who served Ms. Hubbell her last drink prior to leaving the restaurant where Ms. Hubbell later was involved in the serious crash.

I continued to observe both male bartenders, Randy and Chad, mix their drinks using the free pour method. Each of the hand mixed drinks appeared to be made consistently using a heavy alcohol pour with only a small amount of mix to top off the drink. At one point, a waitress returned two drinks to Randy telling him they were both too strong and the patrons returned them as they were unable to drink them. While Randy listened to her, he appeared disinterested, as he made two more drinks using a more moderate amount of alcohol and more of a mix to make the drink less strong. As Randy mixed the two replacement drinks, the waitress took small sips of

both the drinks she had returned and, after sampling both of them, made a sour like face telling Randy “the drinks burned” and they were too strong to drink.

While seated at the bar, I observed two patrons seated to my left that had slurred speech while engaging in a lengthy conversation with both Randy and Chad. Both of these patrons appeared to be intoxicated. Both patrons finished the last sips of their drinks and were, fortunately, with friends who appeared to be driving these two intoxicated males from the restaurant. When both patrons stood up from the bar they appeared to be unsteady on their feet and highly intoxicated. It is clear they had been over-served alcoholic beverages by this restaurant. It is also clear that Randy did nothing about intoxicated patrons leaving the restaurant. Randy did not shut off the patrons nor ensure that they were not driving when they left the restaurant.

While continuing to sit at the bar neither Randy nor Chad seemed to have any regard for the sobriety of the patrons and only asked them if they wanted another drink when their current drink was nearly empty. It was very clear as I watched the chemistry between the bartenders, especially Randy and the patrons seated at the bar, that they knew each other and most likely were long time customers.

On Friday, May 3, 2019 at 6:50pm I arrived at Yong Shing in Auburn and sat at a table adjacent to the bar with a full view of the entire bar and entrance to the lounge area.

During my time there, I observed three people, two women and a man, seated in front of me at the bar drinking alcoholic beverages. These patrons appeared highly intoxicated. I watched as the three spoke very loudly, nearly yelling in badly slurred speech so that everyone could hear their conversation within 15-20 feet. During my time observing the three patrons, they were served no fewer than 4 alcoholic beverages each by the bartender Randy in a 60 minute timeframe. This occurred after I formulated the opinion that they were intoxicated.

At one point the three stood up to leave and were greeted by 3 male individuals in their 60’s who entered and appeared to be friends of theirs. The three men then ordered drinks from Randy, and the three previously mentioned above that were seated at the bar, stayed in their seats for another 15-20 minutes before turning over their seats to the three men that had just arrived. There was no attempt by Randy or any other employee to determine whether the intoxicated customers were driving from the restaurant or had made other arrangements.

While watching these three men, who appeared to have just arrived from playing golf, as they were wearing golf attire, I overheard their speech to also be very loud and slurred. These three men were yelling so loudly that everyone could hear them throughout the bar, but at no time were they asked to quiet down by the bartender or any wait staff present. Nor did the bartender pay any attention to these men to determine if they were intoxicated.

At one point, one of the men left the seat and walked out of my sight. He returned shortly after with a makeshift straw that was 6-7 feet long made up of 7-8 colored straws squeezed together which are used by patrons to consume drinks from the scorpion bowls. This man then reached across to a table from his bar stool extending the long straw into a scorpion bowl being consumed by two young ladies at a table seated next to our table. The patron attempted to

syphon some of their drink through the long straw. This man then approached the two young ladies and carried on a conversation with them as he appeared to be flirting with both of them. Shortly thereafter the man returned to the bar and was served and consumed two more drinks along with his two male friends.

At one point this man called for Randy, who then served each of them a shot of an unknown hard liquor in a tall thin glass that appeared to hold two or more ounces. The three males then gulped the shots down in one sip and finished their drinks in front of them. It appeared that all three individuals were displaying clear and visible signs of intoxication as their speech was slurred and extremely loud. Again, at no time did any employee approach them and ask them to quiet down, take their drinks from them, or ask if they had safe transportation home.

A short time later the man previously described with the long straw then sat at a table against the back wall of the lounge where two women were sitting by themselves at a booth. Both women appeared very uncomfortable as this male patron made himself comfortable at their booth and sat with them. Shortly after this, the male patron stepped away from the booth after seeing they were not impressed with him and he never returned.

Also seated at the bar next to the three men above were two women. The first woman appeared to be in her late 60's and the other woman was younger, appearing to be in her middle 30's. The bartender Randy served them no fewer than 4 mixed drinks in a 90 minute timeframe.

The older woman appeared to be consuming a mixed drink in a rocks glass similar to a Black Russian. This drink had what appeared to be two types of hard liquor in it, having a dark layer of liquor on the bottom of the glass and clear liquid, consistent with vodka on top. The older woman consumed no fewer than 3 of these types of drinks in a full rocks glass in my presence.

A seat then opened up at the bar by the entrance of the lounge and I sat at one of the barstools to get a clearer view of the ladies described above and how Randy mixed the drinks. I wanted to view whether he free poured his alcohol or measured the amount of alcohol used in each drink using a jigger or shot glass. During my time seated at the bar I watched as Randy "free poured" all of his mixed drinks using two hands pouring two different types of alcoholic beverages, usually Rum, into glasses simultaneously. When Randy would free pour the mixed drinks, many of which were Mai Tai's, he would first put ice in a rocks glass and pour two liquor bottles at a time, filling the glasses to within ½ inch of the top before pouring a non-alcoholic pre-mixed flavored liquid into the glass. Randy would then take a larger cup and place it over the top of the glass and shake it vigorously to mix the drink contents. This resulted in mixed drinks with excessive of amounts of alcohol resulting in customers being more likely to become intoxicated.

Summary of Facts

The representative of the restaurant, who is also the manager of the restaurant, was deposed, as was the bartender who served the drink to Ms. Hubbell.¹ It appears from the bar tab that the tab

¹ At the time of this opinion report, the evidence available for the alcohol served to Ms. Hubbell is one glass of wine, but at her criminal plea hearing, she admitted to drinking a glass of wine and a Mai Tai at the bar, and this admission to two drinks was also made to the arresting officer

was opened at 8:01 pm on March 24, 2017 and closed at 8:44.² The first name of Ms. Hubbell appears on the receipt, as does the first name of her companion. The receipt reads:

#ERIN.JESS
Yong Shing
90 Auburn Street
Auburn, MA 01501
Phone (508)832-0622

*** Reprint (1) ***
Date: Mar. 24, 2017. Time: 08:44PM
Server: Randy Table : ERIN.JESS
Bill: 0367

1	Ab Mai Tai	7.24
1	Cabernet (GLS)	5.60
Subtotal		12.84
%Meal Tax		0.90
Total		13.74
Cash		20.00
Change		(6.26)

Open Time : Mar 24, 2017 08:01PM
Thank you, come again.

Ms. Hubbell then left the bar some time after closing the tab and traveled onto Auburn Street in her vehicle. According to the Auburn Police Department crash report, Ms. Hubbell's vehicle traveled from 90 Auburn Street to the area of 185 Auburn Street where she crashed into a vehicle driven by Mr. Salmonsens and caused severe injuries to Mr. Salmonsens.

Ms. Hubbell was arrested at the scene and charged with OUI-L Causing Serious Bodily Injury, OUI-L, Negligent Operation of a Motor Vehicle, Failure To Stay Within Marked Lanes and Possessing An Open Container Of Alcohol In A Motor Vehicle. According to the Worcester District Court docket (1762CR002155), Ms. Hubbell admitted to sufficient facts for the charge of OUI-L Causing Serious Bodily Injury and Negligent Operation of a Motor Vehicle. The civil infractions of marked lanes violation and open container of alcohol were placed on file. The charge of OUI-L (without serious bodily injury) was dismissed. During her plea hearing, Ms.

² See exhibit 4 to Mr. Chao's deposition.

Hubbell admitted that her last drink was served to her at Yong Shing, and admitted that she should not have been driving at the time.

Officer Kaperonis, who was at the scene and arrested Ms. Hubbell, testified in his deposition that he believed Ms. Hubbell operated her motor vehicle while impaired by alcoholic beverages and that she was visibly intoxicated at the scene.

The deposition of the manager, Mr. Chao was reviewed (taken on July 24, 2019). He testified that all of his employees are TIPS certified and that the restaurant has not changed its procedures for service of alcoholic beverages since the date of this incident.

He further testified:

- The purpose of TIPS is to not serve intoxicated people.
- Their employees are to check patrons when they come into the restaurant to make sure they are not intoxicated.
- When they do serve a drink, the employees are to monitor the patron to make sure they do not become intoxicated.
- They continuously monitor customers for signs of intoxication.
- The employees are trained to keep customers from becoming intoxicated.
- If the customer becomes intoxicated, that could cause fights, loud noise, and the customer driving and injuring himself or others.
- They monitor the customers so that they will not become drunk drivers on the road.
- TIPS are rules that their employees follow to make sure that customers do not become intoxicated.
- The restaurant's rules for service of alcohol are meant to keep customers and third parties safe.
- It is a violation of Massachusetts law to over-serve alcohol to a customer.
- It is also a violation of the Yong Shing's rules for alcohol service to over-serve a customer.
- If a customer gets intoxicated by alcohol served by the restaurant, it is a failure of the restaurant's rules for safe service.
- If the employee sees a customer showing signs of intoxication, they have to call the bartender and shut them off. Second, they move them out to the lobby and wait for a car or a cab. If the customer does not have a driver, and they will not cooperate, the employees are to call the police.
- The bar had two bouncers in the bar area who, among other things, were to watch customers for signs of intoxication.
- The bar will usually not serve customers more than three drinks.
- The bartenders do not measure the alcohol, they free pour.
- If a bartender makes a drink too strong, either the customer will complain to the manager or the server will tell the manager. In the prior three years, no server has told the manager that the drinks are too strong.

- When notified by the ABCC that Erin Hubbell listed their restaurant as the last place she had a drink at the time that she admitted to drunk driving, the management did no investigation and did not speak to the bartender.
- Erin Hubbell was a regular customer and known to the employees.

On July 24, 2019, Mr. Loo Meng Cheah (a/k/a Randy Cheah) was deposed. He testified:

- He is the head bartender which is one step down from restaurant manager.
- Erin Hubbell was a regular customer and known to him. She would not get intoxicated on one glass of wine.
- He has been TIPS certified for at least 15 years.
- He sometimes has drinks returned to him for being too strong. If this happens, he does not report this to the manager.
- He looks for signs of intoxication, such as customers getting loud or “acting funny.”
- If he sees signs of intoxication, he shuts off the customer.
- If the customer is shut off and tries to leave, he calls the police.
- He does not report to the manager when a customer is shut off or the police are called.
- The goal of this training is to keep customers from getting intoxicated.
- If they get intoxicated at the bar, they are considered over-served.
- His training is to not serve customers to the point of intoxication.
- If a customer arrives at the bar having consumed alcohol elsewhere, and the bar serves that customer one drink, the customer then shows signs of intoxication, it is his position that the bar has not over-served that customer because the customer consumed alcohol elsewhere.
- It is a violation of Yong Shing’s rules on service of alcohol to over-serve alcohol to a customer.
- On a prior violation of alcohol service by the ABCC which involved Randy over-serving a woman who then passed out at his bar, he did not see that she was intoxicated because he was busy. He also stated that a different customer ordered two beers and gave one to the woman (last drink) and denied the allegations in the ABCC report.

I further reviewed two affidavits from the security personnel, Mark Larson and Joseph Duocimo. The affidavits were unsigned, but were approved by each. I expect to update this opinion when their depositions are taken.

In those affidavits, they spoke of being stationed at the door and in the bar (1 each) during Friday and Saturday nights. They were there for the larger weekend crowds with Karaoke starting at 9 pm.

When guests came into the bar, the person stationed at the door checks identification to determine if each person is over 21. Those under 21 are given a particular wristband to identify their age. Just prior to Karaoke, the security personnel removes any person under 21 from the bar.

While stationed at the front door, the security person asks for identification, but also checks customers both entering and exiting the restaurant to determine if the patrons have consumed too much alcohol to safely drive.

The person stationed inside the bar keeps a lookout for patrons who have consumed too much alcohol. If a customer is determined to have ingested too much alcohol, the security person shuts off any further alcoholic drinks, offers non-alcoholic drinks and might offer appetizers or other food.

If a person chooses to leave the bar and the security person feels that the customer can not safely drive due to the ingestion of alcohol, the security person determines whether a companion of the customer can give the customer a ride home. If that is not an option, the security person offers to call the customer a cab or Uber. The customer is told not to worry about leaving their vehicle overnight in the restaurant parking lot as it will not be towed.

If the customer refuses any help and insists on driving, the police are called. The policy at Twenty One Corp is to not let a customer leave the restaurant in an impaired condition. The security personnel are required to keep a lookout for impaired customers from their arrival to their departure.

Neither of the security personnel have TIPS training or any other training in determining when the customers might have reached impairment due to the ingestion of alcoholic beverages.

Analysis and Conclusions

The overall goal of the Massachusetts statutes, regulations and case law concerning the service of alcohol at commercial establishments is to prevent servers of alcoholic beverages from serving customers to the point that they would become intoxicated and cause harm to themselves or others. By its representative's and employees' testimony, the alcoholic beverage service rules were meant to protect customers, employees and third parties. The restaurant's employees are expected to follow these rules.

It is important to note that part of the Yong Shing's rules is that when they do serve a drink, the employees are to monitor the patron to make sure they do not become intoxicated. If the employees see signs of intoxication, they are to report the observations to a bartender and then action is taken to prevent the intoxicated person from leaving the restaurant and driving away. The restaurant also employs security personnel during the high traffic times, such as Karaoke on Friday and Saturday nights to ensure that persons are not over-served alcoholic beverages before leaving in an impaired state resulting in a drunk driver being on the roads of the Commonwealth.

A review of the testimony and documents in this matter, and my own observations of the service of alcohol, leads me to the conclusion that the employees regularly violated the rules for service of alcohol to their customers. I observed the bartenders over-pour drinks making them stronger in their effect on the customers and causing the customers to become intoxicated. I observed the employees serve customers who appeared intoxicated when the bartender served them another alcoholic beverage. The employees did not exert sufficient control over the customers or the

service of alcoholic beverages, creating a high risk that a customer would leave the restaurant too impaired to safely operate an automobile.

The management of the restaurant should have been on notice of the likelihood of an impaired person leaving the restaurant and driving their automobile on the road by observing the mode of operation of their employees. As detailed above, the service of alcoholic beverages at the restaurant bar was highly negligent, almost free-flowing. The employees observed few or none of the rules for service of alcoholic beverages taught under the TIPS program and failed to comply with their internal rules for service of alcohol. Both sets of rules are promulgated to keep customers from ingesting more alcohol than is safe and to keep them from operating a motor vehicle in an impaired manner. The rules were designed to protect the employees, customers and the public from the consequences of an impaired operator of an automobile.

Twenty One Corp, d/b/a Yong Shing, failed in the service of alcohol to its customers and this greatly increased the risk of an impaired customer leaving the restaurant and driving in an impaired manner. It also failed to follow its stated proper method of operation concerning the service of alcohol which would have alerted management that customers were being over-served alcoholic beverages and then leaving the restaurant while impaired.

This appears to be the case with Ms. Hubbell on the night of the incident in the complaint, given that she left the restaurant without intervention, drove approximately one-half mile, and collided with Mr. Salmonsens. The crash occurred approximately five minutes after she left the restaurant. At the scene, she was arrested for operating a motor vehicle under the influence of intoxicating liquors. The officer at the scene determined that she was visibly intoxicated. Ms. Hubbell admitted to sufficient facts in the Worcester District Court on that criminal charge and was given a Continuance Without a Finding by the court and placed on probation.

It is my opinion that the Twenty One Corp employees' violations of the employer's rules for service of alcoholic beverages, which were intended for the protection of third parties, greatly increased the risk of harm to the general public. These violations resulted in allowing Ms. Hubbell, who was impaired by alcohol from the defendant's bar, to drive from the restaurant and collide with Mr. Salmonsens' vehicle.

It is my opinion that the true, observed method of operation of Twenty One Corp for service of alcoholic beverages created a high likelihood that customers would become impaired by alcoholic beverages while patronizing the bar and then drive from the bar under the influence of the consumed alcoholic beverages. As stated above, the employees disregarded the company's stated rules for safe service of alcoholic beverages and the management did not intervene and correct the violations.

Superior Court Rule 30B Certification

I hereby certify that this disclosure accurately states the subject matter(s) on which I am expected to testify, the substance of the facts and opinions to which I am expected to testify, and a summary of the grounds for each opinion to which I am expected to testify at trial.

Signed under the pains and penalties of perjury on



Keith Keady

Addendum C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT

DOCKET NO. 1885CV0630D

ERIC SALMONSEN,

Plaintiff

VS.

ERIN HUBBELL and TWENTY-ONE
CORP., d/b/a YONG SHING RESTAURANT,

Defendants

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT TWENTY-ONE CORP., d/b/a YONG SHING RESTAURANT'S
MOTION FOR SUMMARY JUDGMENT**

25
||

INTRODUCTION

This action arises from a motor vehicle accident involving the plaintiff Eric Salmonsén (“plaintiff”) and the defendant Erin Hubbell (“Hubbell”) after Hubbell was served alcohol at the Yong Shing Restaurant (“Yong Shing”), an establishment owned and operated by the defendant Twenty-One Corp. (“defendant”). The action was commenced with the filing of the Complaint on April 24, 2018. Thereafter the Complaint was amended twice, with the Second Amended Complaint including two counts against the defendant: Count III – Dram Shop Violation and Count IV – Negligence. The defendant now moves for summary judgment as to Counts III and IV of the Second Amended Complaint. A hearing on the motion took place on December 16, 2021. Based upon the written submissions of the parties and oral argument, the defendant’s motion for summary judgment is **ALLOWED**.

FACTS

On March 24, 2017 the Yong Shing was located at 90 Auburn Street, Auburn, MA. The restaurant was owned by the defendant, and Michael Chao was the presented of the corporation. The maximum seating capacity at the Yong Shing was 160 people, including a bar area with counter seating for 18 people and 5 stools and 4 tables on the backside. As of March 24, 2017, Loo Meng Cheah (“Randy”) had worked at Yong Shing for 20 -25 years, starting as a waiter and working his way to head bartender. Typically, on Friday evenings between 4:00 p.m. and 1:00 a.m. 2 - 3 bartenders would be on duty, with 3 servers working in the bar area.

On March 24, 2017 Randy held a current Training for Intervention Procedures (“TIPS”) certificate that had been renewed several times over his years of employment at the Yong Shing. TIPS involved the training of those serving alcohol in the recognition of intoxicated patrons.

Hubbell and Jessica Melanson (“Melanson”), at all times relevant hereto, were the co-owners of the Yankee Diner in Charlton MA. On Friday, March 24, 2017 Hubbelll worked at the diner from 6:00 a.m. to 2:00 p.m., closed it at 2:00 p.m., and after preparing for dinner reopened it for dinner hours from 5:00 p.m. to 8:00 p.m.. Hubbell and Melanson closed the diner at approximately 7:15 – 7:30 p.m., and then proceeded to the Yong Shing for a drink and appetizers. They took separate vehicles from the diner to the Yong Shing.

Hubbell and Melanson arrived at Yong Shing at approximately 8:00 p.m. on March 24, 2017. There is no evidence that Hubbell was intoxicated upon her arrival at the Yong Shing. Randy was working at the bar where there was seating available for 16 people. Randy was familiar with Hubbell as a regular customer at Yong Shing, and knew her as a person who would not become intoxicated after drinking one glass of wine. On the evening of March 24, 2017 Melanson ordered a Mai Tai and Hubbell ordered a glass of wine. Hubbell recalls ordering and

eating some teriyaki sticks as well, but the receipt for the evening shows only one Mai Tai and one glass of Cabernet. The receipt also states that the tab was opened at 8:01 p.m. and closed at 8:44 p.m. Randy put 6 ounces of wine in the glass he gave to Hubbell. He made no observations of any signs of intoxication when he served Hubbell, and there is no other evidence of the state of Hubbell's sobriety at the time she was served by Randy.

After ordering at the bar, Hubbell was observed moving around the bar area, speaking with other customers. She was not observed taking a drink from anyone else. Randy did not observe her to show signs of intoxication, and there is no other testimony that she did exhibit signs of intoxication in the Yong Shing. Shortly before she left, she was observed speaking with another regular customer, John McLean ("McLean"), an off-duty police officer. Randy observed no signs of intoxication as Hubbell spoke with McLean and walked toward the lobby of the bar where the exit was located.

After leaving the Yong Shing, Hubbell got into her car and headed east on Auburn Street. Her vehicle crossed the double yellow lines down the center of the roadway and collided head-on with a vehicle operated by the plaintiff, causing the plaintiff serious injury. The Yong Shing is located at 90 Auburn Street, and the crash occurred adjacent to 185 Auburn Street. Police arrived at the scene of the accident and noted the time of the call as 8:55 p.m. Officer Kaperonis of the Auburn Police Department spoke with Hubbell and noted a strong odor of alcohol. He observed her speech to be slurred, her eyes to be bloodshot and glassy, and unsteadiness in her gait. Officer Kaperonis asked Hubbell if she had been drinking, and she responded in the affirmative. She said she was coming from the Yong Shing where she had a glass of wine and a Mai Tai. She also stated that she should not have been driving. The police officer formed the opinion that Hubbell was operating under the influence of alcohol. Hubbell refused both a field

sobriety test and a breathalyzer test. Two 50 ml. bottles of Dr. McGillicuddy's liqueur were located in Hubbell's vehicle. One of the bottles was empty, the other was full.

Hubbell was charged with driving under the influence of alcohol and possession of an open container of alcohol in a motor vehicle.

STANDARD OF REVIEW

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Comm'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts that would establish the existence of a genuine issue of material fact in order to defeat (the) motion for summary judgment." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989), citing *O'Brion, Russell & Co. v. LeMay*, 370 Mass. 243, 245 (1976).

DECISION

"It is true that a tavern keeper's service of alcohol to a person already intoxicated may be some evidence of the defendant's negligence because it violates G. L. c. 138, § 69. *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327 (1982). But § 69 (a provision prohibiting the sale of liquor

to intoxicated persons) does not grant an independent ground for civil liability. The liability of the defendant “must be grounded in the common law of negligence.” *Bennett v. Eagle Brook Country Store, Inc.*, 408 Mass. 355, 358 (1990). The applicable rule is that “a tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated ... (T)he plaintiff (must) introduce some evidence showing the defendant was on notice that it was serving alcoholic beverages to an intoxicated patron.” *Kirby v. LeDisco, Inc.*, 34 Mass. App. Ct. 630, 631-632 (1993), citing *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327-328 (1982).

There are circumstances where juries have been permitted to infer intoxication at the time of service, without direct evidence. In *O’Hanley v. Ninety-Nine, Inc.*, 12 Mass. App. Ct. 64 (1981) the court found that, in the absence of direct evidence of signs of intoxication at the time of service, “a rational jury could properly conclude that a person in the position of the (customer) would have displayed some outward manifestation of intoxication well in advance of ordering his fifteenth beer or his sixth martini which could have been recognized by an experienced bartender who was more interested in observing the law than in pocketing tips.” *Id.* at page 69. In *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982), the customer in question was served at least six White Russians over a five-hour period while behaving in a loud, drunk, and vulgar manner. The court found that the customer’s “loud and vulgar conduct and the defendant’s service to (the customer) of a large number of strong alcoholic drinks was each sufficient to put the defendant on notice that it was serving a man who could potentially endanger others.” *Id.* at page 328.

“Evidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron’s intoxication was evident at the

time the last drink was served.” *Douillard v. LMR, Inc.*, 433 Mass. 162, 165 (2001). “Our reluctance to accept such evidence as sufficient stems from the uncertainties of the situation, including the possible delayed impact of the consumption of alcohol, and the unknown effect on a patron of the last drink served to him by a licensee.” *Vickowski v. Polish Am. Citizens Club*, 422 Mass. 606, 612 (1996) While “(e)vidence of later intoxication has been admitted for purposes of bolstering other evidence concerning a patron’s condition at the time alcohol was served” (*Douillard v. LMR, Inc.*, 433 Mass. 162, 165-166 (2001)), “(f)rom the mere fact of intoxication observed at some later time (e.g., at the accident scene), one (cannot) tell what contribution the patron’s final drink had made toward that state of intoxication.” *Id.* at page 165.

In the present case, the evidence is only of the service of one glass of wine and one Mai Tai to two customers who closed out their tab in under 45 minutes. There is no evidence of Hubbell behaving inappropriately or exhibiting any signs of inebriation, and no evidence of excessive service. In his opposition to the defendant’s motion for summary judgment the plaintiff has not identified any direct evidence of signs of intoxication at the time of service by the defendant. Hubbell’s condition, as observed by witnesses and police at the scene of the accident, does not permit a reasonable inference to a sufficient degree of probability, and would require a jury to engage in impermissible speculation to find that Hubbell was visibly intoxicated when served at the Yong Shing. See *Vickowski v. Polish Am. Citizens Club*, 422 Mass. 606, 610 (1996). “(A) tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have know that the patron is intoxicated.” *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327 (1982). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” *Vickowski v. Polish Am. Citizens Club*, 422 Mass. 606, 610 (1996). The plaintiff must introduce evidence at trial that the

defendant served alcohol to a visibly intoxicated person to meet his burden of proof. See *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982). Here, the plaintiff has no evidence sufficient to meet that burden of proof.

The plaintiff acknowledges that he has no evidence that Hubbell was exhibiting signs of intoxication when she was served alcohol by the defendant. He suggests, as an alternative to the presentation of such evidence, that the defendant's mode of operation should be a permissible substitute for evidence of service to a visibility intoxicated person. "One variation to the traditional premises liability approach is called the mode of operation approach. This approach focuses on "the nature of the defendant's business (that) gives rise to a substantial risk of injury to customers from slip and fall accidents." (internal citation omitted). This approach also considers whether "the plaintiff's injury was proximately caused by such an accident within the zone of risk." (internal citation omitted). Courts adopting this approach have concluded that where an owner's chosen mode of operation makes it reasonably foreseeable that a dangerous condition will occur, a store owner could be held liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions." *Sheehan v. Roche Bros. Supermarkets*, 448 Mass. 780, 785-786 (2007). "Under the mode of operation approach, the plaintiff's burden to prove notice is not eliminated. Instead, the plaintiff satisfies the notice requirement if he establishes that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation." *Id.* at page 786.

In *Sheehan*, supra, evidence of mode of operation was permitted to serve as notice to a premises owner of a dangerous condition on its premises to satisfy the plaintiff's burden of

proof.¹ Mode of operation has not been permitted as substitute evidence for visible signs of intoxication at the time of service in a liquor liability claim, however. The plaintiff's reliance on *Sarkisian v. Concept Restaurants, Inc.*, 471 Mass. 679 (2015) as the application of the "mode of operation" to the plaintiff's burden of proof in cases against alcohol-serving establishments is misplaced. Although the defendant in the *Sarkisian* case happened to be an establishment that served alcohol to its patrons, the alleged liability arose from the condition of the premises at the time of a slip and fall accident. The claim did not arise from an alleged over-service of alcohol to a patron who then caused injury to another, but from a puddle on the dance floor in an establishment where customers regularly danced while holding glasses of liquid.

Tobin v. Norwood County Club, 422 Mass. 126 (1996), like *Sarkisian*, does not provide guidance in this matter. In *Tobin*, the liability of the defendant was based upon its service of alcohol to a minor who then left the establishment, wandered onto the highway, and was struck by a car and killed. Toxicology reports showed that the minor had a blood alcohol level of .229 two hours after the accident. The country club made exceptions to its usual practices intended to prevent service of alcohol to minors because the party attended by the plaintiff's decedent was being hosted by an employee of the club. The jury found that the defendant, through its bartender, knew or should have known that drinks were being passed to the minor decedent after purchase. Liability was based upon the legal obligation of the defendant to refrain from serving minors.

¹ A customer of the Roche Brothers supermarket who slipped and fell due to a grape on the floor was permitted to prove the defendant's notice of the dangerous condition by proving the condition was reasonably foreseeable and resulted from the owner's self-service mode of operation, rather than by proving that the defendant had actual notice of the grape on the floor or should have known about the grape on the floor due to the length of time it was present prior to the customer's fall, the traditional method of proof.

The defendant in this case is not accused of serving alcohol to a minor. The very business of the defendant is serving alcohol to its patrons of statutory drinking age, and its legal obligation is to refrain from serving alcohol to patrons exhibiting signs of intoxication. There remains no evidence sufficient to establish the defendant served alcohol to Hubbell when she was exhibiting signs of intoxication, and the plaintiff has no reasonable expectation of offering such evidence at the time of trial.²

The plaintiff next argues that the defendant's failure to follow its own policies and procedures is sufficient for a finding of negligence. Again, the plaintiff cannot demonstrate how the defendant failed to follow its policies and procedures on March 24, 2017. To prove negligence, a plaintiff must prove (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, and (3) the breach of duty was a substantial contributing cause of injury to the plaintiff. See *Doule v. Foster*, 487 Mass. 1 (2021). The plaintiff cannot present evidence establishing a breach of duty by the defendant with the only available evidence that of one glass of wine was served to Hubbell.³ The defendant's duty was to refrain from serving alcohol to visibly intoxicated patrons, and the plaintiff has not presented evidence sufficient to prove the defendant breached that duty or any of its own policies and procedures intended to satisfy that duty on March 24, 2017.

² The plaintiff's contention that observations made of bartenders at the Yong Shing two years after the evening that Hubbell visited the establishment suffice to prove Hubbell was served while exhibiting signs of intoxication is not convincing.

³ The plaintiff's proposed evidence in the form of observations of bartenders at the Yong Shing free-pouring alcohol for mixed drinks in 2019 has no relevance to the service of one glass of wine to Hubbell in 2017.

ORDER

Based upon the foregoing and for the reasons advanced by the defendant, the defendant's motion for summary judgment is **ALLOWED**.

Date: December 30, 2021



Susan E. Sullivan
Associate Justice of the Superior Court

Addendum D

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 04/24/2018
- DCM Track:
- F - Fast Track
- Initiating Action:
- Motor Vehicle Negligence - Personal Injury / Property Damage
- Status Date:
- 04/24/2018
- Case Judge:
-
- Next Event:
-

All Information Party Event Tickler Docket Disposition

Party Information

Salmonsens, Eric
- Plaintiff

Alias

Party Attorney

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[More Party Information](#)

Hubbell, Erin
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Party Attorney

- Attorney
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- Bar Code
- PROPER
- Address
- Phone Number
-

[More Party Information](#)

Twenty One Corp.
- Defendant

Alias

Party Attorney

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Harris, Esq., Brian P
- Other interested party

[More Party Information](#)**Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/01/2018 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Hearing on Motion for Attachment	Reardon, Jr., Hon. James G	Held as Scheduled
07/19/2018 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Motion Hearing	Connolly, Hon. Rosemary	Held as Scheduled
12/10/2019 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Pre-Trial Conference	Reardon, Jr., Hon. James G	Rescheduled
04/07/2020 02:00 PM	Civil D		Final Pre-Trial Conference		Rescheduled-Covid-19 emergency
06/04/2020 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Pre-Trial Conference	Yarashus, Hon. Valerie A	Rescheduled
07/21/2020 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Pre-Trial Conference	Frison, Hon. Shannon	Rescheduled-Covid-19 emergency
09/08/2020 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Pre-Trial Conference	Frison, Hon. Shannon	Rescheduled
09/17/2020 11:30 AM	Civil D	WOR-4th FL, CR 25 (SC)	Final Pre-Trial Conference	Frison, Hon. Shannon	Rescheduled
01/19/2021 02:00 PM	Civil D		Final Pre-Trial Conference		Rescheduled-Covid-19 emergency
02/01/2021 11:00 AM	Civil D		Final Pre-Trial Conference	Frison, Hon. Shannon	Rescheduled
05/11/2021 12:00 PM	Civil D		Final Pre-Trial Conference	Hodge, Hon. David	Held via Video/Phone
05/11/2021 02:00 PM	Civil D		Final Pre-Trial Conference	Hodge, Hon. David	Rescheduled
06/24/2021 09:30 AM	Civil D		Motion Hearing to Amend Complaint	Hodge, Hon. David	Rescheduled
06/28/2021 09:30 AM	Civil D		Motion Hearing to Amend Complaint	Hodge, Hon. David	Held - Under advisement
11/30/2021 02:00 PM	Civil D		Rule 56 Hearing	Sullivan, Hon. Susan E	Rescheduled
12/16/2021 02:00 PM	Civil D		Rule 56 Hearing	Sullivan, Hon. Susan E	Held - Under advisement
04/26/2022 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Trial Conference	Hodge, Hon. David	Rescheduled
05/04/2022 09:00 AM	Civil D	WOR-4th FL, CR 25 (SC)	Jury Trial	Hodge, Hon. David	Rescheduled
05/19/2022 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Conference to Review Status	Yarashus, Hon. Valerie A	Held as Scheduled
04/25/2023 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Motion Hearing	Tingle, Hon. Brent A	Rescheduled
05/25/2023 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Motion Hearing	Tingle, Hon. Brent A	Held - Under advisement
06/08/2023 02:00 PM	Civil D	WOR-4th FL, CR 25 (SC)	Final Trial Conference	Tingle, Hon. Brent A	Not Held
06/20/2023 09:00 AM	Civil D	WOR-4th FL, CR 25 (SC)	Jury Trial	Tingle, Hon. Brent A	Not Held

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	04/24/2018	07/23/2018	90	04/26/2018
Answer	04/24/2018	08/22/2018	120	06/04/2018

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Rule 12/19/20 Served By	04/24/2018	08/22/2018	120	
Rule 12/19/20 Filed By	04/24/2018	09/21/2018	150	
Rule 12/19/20 Heard By	04/24/2018	10/22/2018	181	
Rule 15 Served By	04/24/2018	08/22/2018	120	
Rule 15 Filed By	04/24/2018	09/21/2018	150	
Rule 15 Heard By	04/24/2018	10/22/2018	181	
Discovery	04/24/2018	02/28/2020	675	
Rule 56 Served By	04/24/2018	03/20/2019	330	
Rule 56 Filed By	04/24/2018	04/19/2019	360	
Final Pre-Trial Conference	04/24/2018	08/19/2019	482	12/10/2019
Judgment	04/24/2018	04/23/2020	730	
Under Advisement	05/01/2018	05/31/2018	30	05/03/2018
Under Advisement	06/28/2021	07/28/2021	30	06/29/2021
Under Advisement	12/16/2021	01/15/2022	30	01/04/2022
Under Advisement	05/25/2023	06/24/2023	30	05/30/2023

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/24/2018	Attorney appearance On this date John J McMaster, Esq. added for Plaintiff Eric Salmonsens		
04/24/2018	Case assigned to: DCM Track F - Fast Track was added on 04/24/2018		
04/24/2018	Original civil complaint filed.	1	
04/24/2018	Civil action cover sheet filed.	2	Image
04/24/2018	Demand for jury trial entered.		
04/24/2018	Defendant files Uniform Counsel Certification. Applies To: Salmonsens, Eric (Plaintiff)	3	
04/24/2018	Plaintiff Eric Salmonsens's Motion for Prejudgment Attachment. (Exhibits not scanned)	4	 Image
04/24/2018	Endorsement on Motion for Prejudgment Attachment (#4.0): Summons and Order of Notice to issue Returnable 5/1/18 @ 2:00pm in Room 25. Judge: Reardon, Jr., Hon. James G		
04/26/2018	Service Returned for Defendant Hubbell, Erin: Service made at last and usual; Service made on 04/26/18 (Summons and Order of Notice)	5	 Image
05/01/2018	Matter taken under advisement Judge: Reardon, Jr., Hon. James G The following event: Hearing on Motion for Attachment scheduled for 05/01/2018 02:00 PM has been resulted as follows: Result: Held - Under advisement		
05/01/2018	Attorney appearance On this date Christopher Joseph O'Rourke, Esq. added for Defendant Erin Hubbell		
05/01/2018	Opposition to Plaintiff's Motion for Real Estate Attachment filed by Erin Hubbell Filed in Court	6	 Image
05/02/2018	Endorsement on Motion for Real Estate Attachment (#4.0): ALLOWED ALLOWED After hearing. Notices mailed 5/4/18 Judge: Reardon, Jr., Hon. James G		
05/03/2018	Findings and Order for Approval of Plaintiff(s) Eric Salmonsens's Motion (#4.0) for an Attachment as to Defendant Erin Hubbell in the amount of \$750,000.00.	7	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Judge: Reardon, Jr., Hon. James G		
06/04/2018	Received from Defendant Hubbell, Erin: Answer with claim for trial by jury;	8	 Image
06/07/2018	Other Interested Party Brian P Harris, Esq.'s Motion of Green Mountain Insurance Company to Intervene for the Limited Purpose of Depositing Funds into Court and Withdrawing its Defense of the Defendant, Erin Hubbell	9	 Image
06/07/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Harris, Esq., Brian P (Other interested party)	9.1	 Image
06/07/2018	Rule 9A notice of filing and List of Documents Filed Applies To: Harris, Esq., Brian P (Other interested party)	9.2	
06/19/2018	The following form was generated: Notice to Appear Sent On: 06/19/2018 11:17:32		
07/19/2018	Event Result:: Motion Hearing scheduled on: 07/19/2018 02:00 PM Has been: Held as Scheduled Comments: FTR Hon. Rosemary Connolly, Presiding Appeared: Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
08/14/2018	Endorsement on Motion to Intervene for the Limited Purpose of Depositing Funds Into Court and Withdrawing Its Defense of the Defendant Erin Hubbell (#9.0): Other action taken See Court Order of Judge Connolly dated 8/14/18. Notices mailed 8/15/18 Judge: Connolly, Hon. Rosemary		
08/14/2018	ORDER: COURT ORDER- (See Order) Copies mailed 8/15/18 Judge: Connolly, Hon. Rosemary	10	 Image
08/28/2018	Plaintiff Eric Salmonsens Motion to Amend the Complaint	11	 Image
08/28/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Salmonsens, Eric (Plaintiff)	11.1	
09/08/2018	Attorney appearance On this date Robin Aaronson Maher, Esq. added for Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant		
09/10/2018	Endorsement on Motion to Amend the Complaint (#11.0): ALLOWED Plaintiff's motion to amend his complaint to add a defendant and additional claims is ALLOWED. Notices mailed 9/12/18 Judge: Connolly, Hon. Rosemary		 Image
09/10/2018	Amended: original complaint filed by Eric Salmonsens - CJ	12	 Image
09/20/2018	Attorney appearance On this date Christopher Joseph O'Rourke, Esq. dismissed/withdrawn for Defendant Erin Hubbell		
10/09/2018	Service Returned for Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant: Service through person in charge / agent; Service made on 09/28/18	13	 Image
11/19/2018	Received from Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant: Answer to amended complaint;	14	 Image
01/31/2019	Plaintiff Eric Salmonsens's affidavit of written notice of intent to offer as evidence: medical bills pursuant to G.L. c.233, § 79G	15	
10/02/2019	The following form was generated:		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Notice to Appear for Final Pre-Trial Conference Sent On: 10/02/2019 12:25:52		
10/18/2019	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 10/18/2019 13:24:09		
10/28/2019	Plaintiff Eric Salmonsens Motion to Extend the Discovery Deadline	16	 Image
10/29/2019	Affidavit of compliance with Superior Court Rule 9A No Opposition Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff)	16.1	 Image
11/21/2019	Endorsement on Motion to Extend the Discovery Deadline (#16.0): ALLOWED Discovery deadline is extended to 2/28/20. Notices mailed 11/26/19 Judge: Reardon, Jr., Hon. James G		 Image
12/10/2019	Event Result:: Final Pre-Trial Conference scheduled on: 12/10/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. James G Reardon, Jr., Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
12/10/2019	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 12/10/2019 14:35:21		
03/27/2020	Plaintiff Eric Salmonsens Motion to Continue Pre-trial Conference scheduled for April 7, 2020 to July 21, 2020 (Filed with Defendant Twenty One Corp (E-FILED)	17	 Image
04/02/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 04/02/2020 09:56:18		
04/02/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Final Pre-Trial Conference scheduled on: 04/07/2020 02:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Shannon Frison, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
04/13/2020	Endorsement on Motion to Continue Pre-Trial Conference (#17.0): ALLOWED Allowed as requested. Notices mailed 4/14/2020 Judge: Wrenn, Hon. Daniel M		 Image
04/14/2020	Event Result:: Final Pre-Trial Conference scheduled on: 06/04/2020 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Valerie A Yarashus, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
04/14/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 04/14/2020 10:44:03		
07/01/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 07/01/2020 10:11:43		
07/01/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Final Pre-Trial Conference scheduled on: 07/21/2020 02:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Shannon Frison, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/06/2020	Pleading titled, Notice of Withdrawal of Appearance, filed with the court on 07/06/2020, returned to Defendant/Intervenor listed is not listed as a defendant on this case		
07/06/2020	Party status: Other interested party Harris, Esq., Brian P: Inactive;	19	Image
08/26/2020	Event Result:: Final Pre-Trial Conference scheduled on: 09/08/2020 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Shannon Frison, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
08/26/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 08/26/2020 11:16:01 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville & Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Brian P Harris, Esq. 15 Broad Street, Boston, MA 02109		
09/14/2020	Event Result:: Final Pre-Trial Conference scheduled on: 09/17/2020 11:30 AM Has been: Rescheduled For the following reason: Joint request of parties Hon. Shannon Frison, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
09/14/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 09/14/2020 09:17:45 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville & Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Erin Hubbell 17 Otis t., Auburn, MA 01501 Notice Sent To: Brian P Harris, Esq. 15 Broad Street, Boston, MA 02109		
12/16/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Final Pre-Trial Conference scheduled on: 01/19/2021 02:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Shannon Frison, Presiding		
12/16/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 12/16/2020 13:52:56 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville & Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Brian P Harris, Esq. 15 Broad Street, Boston, MA 02109		
01/25/2021	Event Result:: Final Pre-Trial Conference scheduled on: 02/01/2021 11:00 AM Has been: Rescheduled For the following reason: Joint request of parties Hon. Shannon Frison, Presiding		
01/25/2021	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 01/25/2021 11:39:42 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville & Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Erin Hubbell 17 Otis t., Auburn, MA 01501 Notice Sent To: Brian P Harris, Esq. 15 Broad Street, Boston, MA 02109		
05/05/2021	Event Result:: Final Pre-Trial Conference scheduled on: 05/11/2021 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. David Hodge, Presiding		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
05/10/2021	Conference Memorandum Joint Pre-Trial Conference Report (E-FILED)	18	 Image
05/11/2021	Scheduled: Event: Jury Trial Date: 04/26/2022 Time: 02:00 PM		
05/11/2021	Event Result:: Final Pre-Trial Conference scheduled on: 05/11/2021 12:00 PM Has been: Held via Video/Teleconference Comments: FTR - rm 25 Hon. David Hodge, Presiding		
05/11/2021	Conference Memorandum	20	 Image
05/11/2021	Scheduled: Event: Jury Trial Date: 05/04/2022 Time: 09:00 AM Result: Rescheduled		
05/11/2021	The following form was generated: Notice to Appear Sent On: 05/11/2021 13:59:31 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Erin Hubbell 17 Otis t., Auburn, MA 01501		
05/11/2021	The following form was generated: Notice to Appear Sent On: 05/11/2021 14:00:11 Notice Sent To: John J McMaster, Esq. McMaster Law Offices LLC 9 Monroe St Suite 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Erin Hubbell 17 Otis t., Auburn, MA 01501		
05/14/2021	Plaintiff Eric Salmonsens Motion to amend the Complaint (Second motion) (E-FILED)	21	 Image
05/14/2021	Opposition to to Plaintiff's Second Motion to Amend the Complaint filed by Twenty One Corp. Doing Business as Yong Shing Restaurant(E-FILED)	21.1	 Image
05/14/2021	Reply/Sur-reply Plaintiff's Second Motion to Amend the Complaint Reply Memorandum (E-FILED)	21.2	 Image
05/14/2021	Affidavit of No Opposition from Defendant Erin Hubbell under Rule 9A (E-FILED)	21.3	 Image
05/19/2021	The following form was generated: Notice to Appear Sent On: 05/19/2021 13:02:39 Notice Sent To: John J McMaster, Esq. McMaster Law Offices, LLC 9 Monroe St Unit 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452		
05/19/2021	Event Result:: Motion Hearing to Amend Complaint scheduled on: 06/24/2021 09:30 AM Has been: Rescheduled For the following reason: Request of Plaintiff Hon. David Hodge, Presiding		
05/19/2021	The following form was generated: Notice to Appear Sent On: 05/19/2021 14:33:51 Notice Sent To: John J McMaster, Esq. McMaster Law Offices, LLC 9 Monroe St Unit 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/01/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Motion for Leave to File Motion for Summary Judgment Late	22	 Image
06/01/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Submission of List of documents.	22.1	 Image
06/01/2021	Opposition to motion for leave. filed by Eric Salmonsens	22.2	 Image
06/01/2021	Affidavit of compliance	22.3	 Image
06/28/2021	Matter taken under advisement: Motion Hearing to Amend Complaint scheduled on: 06/28/2021 09:30 AM Has been: Held - Under advisement Comments: FTR - rm 25 Hon. David Hodge, Presiding		
06/28/2021	Endorsement on Motion to Amend the Complaint (Second) (#21.0): ALLOWED After hearing this date, the Plaintiff's Second Motion to Amend the Complaint is ALLOWED. While a close call, the court cannot conclude at this juncture that the Plaintiff's proposed Amendment to the Complaint would be futile. Notices mailed 6/30/21 Judge: Hodge, Hon. David		 Image
06/28/2021	Endorsement on Motion for Leave to File Motion for Summary Judgment Late (#22.0): ALLOWED Motion allowed. Rule 56 motion to be served not later than August 16, 2021. Notices mailed 6/30/21 Judge: Hodge, Hon. David		 Image
09/10/2021	Attorney appearance electronically filed.		 Image
09/10/2021	Attorney appearance On this date Elaine Patrice Belle, Esq. added for Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant (E-FILED) Applies To: Belle, Esq., Elaine Patrice (Attorney) on behalf of Twenty One Corp. Doing Business as Yong Shing Restaurant (Defendant)		Image
09/10/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Submission of List of Documents (E-FILED)	23.7	 Image
09/10/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Motion for Summary Judgment (E-FILED)	23	 Image
09/10/2021	Twenty One Corp. Doing Business as Yong Shing Restaurant's Memorandum in Support of Motion for Summary Judgment (E-FILED)	23.1	 Image
09/10/2021	Exhibits/Appendix for Motion for Summary Judgment [Joint] (E-FILED)	23.2	 Image
09/10/2021	Opposition to p#23: Motion for Summary Judgment filed by Eric Salmonsens (E-FILED)	23.3	 Image
09/10/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (E-FILED)	23.4	 Image
09/10/2021	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Statement of material facts (E-FILED)	23.5	 Image
09/10/2021	Affidavit of Rule 9A Compliance (E-FILED)	23.6	 Image
09/13/2021	Exhibits/Appendix in re: p#23.4 (CD exhibit) Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff)	24	
09/23/2021	The following form was generated: Notice to Appear		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Sent On: 09/23/2021 10:24:54 Notice Sent To: John J McMaster, Esq. McMaster Law Offices, LLC 9 Monroe St Unit 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Elaine Patrice Belle, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452		
10/27/2021	Event Result:: Rule 56 Hearing scheduled on: 11/30/2021 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Susan E Sullivan, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
10/27/2021	The following form was generated: Notice to Appear Sent On: 10/27/2021 14:59:24 Notice Sent To: John J McMaster, Esq. McMaster Law Offices, LLC 9 Monroe St Unit 4, Northborough, MA 01532 Notice Sent To: Robin Aaronson Maher, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452 Notice Sent To: Elaine Patrice Belle, Esq. Segalini, Neville and Maher 465 Waverley Oaks Rd, Waltham, MA 02452		
12/16/2021	Matter taken under advisement: Rule 56 Hearing scheduled on: 12/16/2021 02:00 PM Has been: Held - Under advisement Comments: FTR - rm 25 Hon. Susan E Sullivan, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
12/30/2021	Endorsement on Motion for Summary Judgment (#23.0): ALLOWED after hearing. See memorandum of decision and order. e-documents sent 01/04/2022 Judge: Sullivan, Hon. Susan E		 Image
01/04/2022	ORDER: MEMORANDUM OF DECISION AND ORDER ON DEFENDANT TWENTY-ONE CORP., D/B/A YONG SHING RESTAURANT'S MOTION FOR SUMMARY JUDGMENT The defendant's motion for Summary Judgment is ALLOWED. Entered and Copies mailed 01/04/2022.	25	 Image
01/04/2022	Party status: Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant: Dismissed;		
02/02/2022	Plaintiff Eric Salmonsens Motion for Reconsideration of the Defendant's Motion for Summary Judgment (E-FILED)	26	 Image
02/02/2022	Opposition to P#26 filed by Twenty One Corp. Doing Business as Yong Shing Restaurant to the Plaintiff's Motion for Reconsideration (E-FILED)	26.1	 Image
02/02/2022	Reply/Sur-reply Brief of the Plaintiff (E-FILED)	26.2	 Image
02/02/2022	Rule 9A Affidavit of Compliance	26.3	 Image
02/15/2022	Endorsement on Motion for Reconsideration of the Defendant's Motion for Summary Judgment (#26.0): DENIED There remains no evidence that the defendant served alcohol to a person exhibiting signs of intoxication, and no evidence that defendant Hubbell exhibited signs of intoxication at any time while at the defendant established. Motion DENIED. Notices mailed 2/16/22 Judge: Sullivan, Hon. Susan E		 Image  Image
03/01/2022	Plaintiff Eric Salmonsens Motion to report this matter to the Appeals Court Pursuant to Rule 64. (E-FILED)	27	 Image
03/01/2022	Eric Salmonsens Memorandum Plaintiffs motion to report this matter to the Appeals Court Pursuant to Rule 64. (E-FILED)	27.1	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/01/2022	Opposition to to plaintiffs motion to report the matter to the Appeals Court Pursuant to M.R.Civ.P. Rule 64 (E-FILED) filed by Twenty One Corp. Doing Business as Yong Shing Restaurant	27.2	 Image
03/01/2022	Affidavit Rule 9A Compliance Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff)	27.3	 Image
03/04/2022	Endorsement on Motion to Report this Matter to the Appeals Court Pursuant to Rule 64 (#27.0): DENIED After review of Plaintiff's motion, together with opposition of Defendant, the motion is DENIED. Notices mailed 3/4/22 Judge: Hodge, Hon. David		 Image
03/11/2022	Defendant Erin Hubbell's Motion to Continue the Trial (E-FILED)	28	 Image
03/22/2022	Endorsement on Motion to Continue the Trial (#28.0): ALLOWED Clerk to schedule status conference at which a new trial date will be set. Notices mailed 3/23/22 Judge: Hodge, Hon. David		 Image
03/23/2022	Event Result:: Final Trial Conference scheduled on: 04/26/2022 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. David Hodge, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
03/23/2022	Event Result:: Jury Trial scheduled on: 05/04/2022 09:00 AM Has been: Rescheduled For the following reason: Joint request of parties Hon. David Hodge, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
03/23/2022	The following form was generated: Notice to Appear Sent On: 03/23/2022 09:46:34		
03/23/2022	The following form was generated: Notice to Appear Sent On: 03/23/2022 09:48:34		
03/23/2022	The following form was generated: Notice to Appear Sent On: 03/23/2022 09:51:34		
03/23/2022	The following form was generated: Notice to Appear Sent On: 03/23/2022 09:53:34		
03/23/2022	The following form was generated: Notice to Appear Sent On: 03/23/2022 11:26:28		
05/19/2022	Event Result:: Conference to Review Status scheduled on: 05/19/2022 02:00 PM Has been: Held as Scheduled Comments: FTR - rm 25 Hon. Valerie A Yarashus, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
05/19/2022	Scheduled: Event: Jury Trial Date: 06/20/2023 Time: 09:00 AM Result: Not Held		
05/19/2022	Party status: Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant: Dismissed;		
05/20/2022	The following form was generated:		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Notice to Appear Sent On: 05/20/2022 09:18:01		
05/20/2022	The following form was generated: Notice to Appear Sent On: 05/20/2022 09:19:12		
09/13/2022	Attorney appearance electronically filed.		
03/07/2023	Defendant Twenty One Corp. Doing Business as Yong Shing Restaurant's Motion for Entry of Separate and Final Judgment [E-FILED]	29	 Image
03/07/2023	Twenty One Corp. Doing Business as Yong Shing Restaurant's Memorandum in support of Motion for Entry of Separate and Final Judgment [E-FILED]	29.1	 Image
03/07/2023	Opposition to P#29: Defendant's Motion for Entry of Separate and Final Judgment filed by Eric Salmonsens [E-FILED]	29.2	 Image
03/07/2023	Affidavit of Compliance Pursuant to Superior Court Rule 9A and 9C, as Amended [E-FILED]	29.3	 Image
03/15/2023	The following form was generated: Notice to Appear Sent On: 03/15/2023 13:12:12		
04/24/2023	Attorney appearance On this date Pro Se added for Defendant Erin Hubbell		
04/24/2023	Plaintiff, Defendants Eric Salmonsens, Erin Hubbell, Twenty One Corp. Doing Business as Yong Shing Restaurant's Joint Motion to Continue Hearing of Motion for Entry of Separate and Final Judgment (E-FILED)	30	 Image
04/25/2023	Event Result:: Motion Hearing scheduled on: 04/25/2023 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Brent A Tingle, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
04/25/2023	Endorsement on Motion to Continue Hearing of Motion for Entry of Separate and Final Judgment (#30.0): ALLOWED Notices mailed 4/25/23 Judge: Tingle, Hon. Brent A		 Image
05/23/2023	Endorsement on Motion for Entry of Separate and Final Judgment (#29.0): ALLOWED ALLOWED after hearing where in this instance it is in the interest of judicial economy. The plaintiff intends to appeal the entry of summary judgment for the defendant, Twenty One Corp. Defendant Hubbell's liability insurer has already paid her coverage limit and any trial against her alone will not be dispositive of the case as a whole. Notices mailed 6/13/23 Judge: Tingle, Hon. Brent A		 Image
05/25/2023	Matter taken under advisement: Motion Hearing scheduled on: 05/25/2023 02:00 PM Has been: Held - Under advisement Comments: FTR - rm 25 Hon. Brent A Tingle, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
05/25/2023	Plaintiff Eric Salmonsens's Assented to Motion to Stay the Trial Pending Appeal- Filed in Court	31	
05/25/2023	Endorsement on Motion to Stay the Trial Pending Appeal (#31.0): ALLOWED Allowed by agreement and in the interest of judicial economy where the plaintiff intends to appeal the entry of summary judgment as to Twenty One Corp d/b/a Yong Shing Restaurant. Notices mailed 5/31/23 Judge: Tingle, Hon. Brent A		 Image
05/25/2023	Plaintiff Eric Salmonsens's Motion of Indigency- Filed in Court	32	
05/30/2023	Event Result:: Final Trial Conference scheduled on: 06/08/2023 02:00 PM		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Has been: Not Held For the following reason: Request of Plaintiff Comments: case stayed pending appeal Hon. Brent A Tingle, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
05/30/2023	Event Result: Jury Trial scheduled on: 06/20/2023 09:00 AM Has been: Not Held For the following reason: Request of Plaintiff Comments: case stayed pending appeal Hon. Brent A Tingle, Presiding Staff: Laurie Jurgiel, Assistant Clerk Magistrate		
06/09/2023	Endorsement on Motion of Indigency (#32.0): DENIED DENIED without prejudice. This motion should be filed in the appellate court. Notices mailed 6/13/23		 Image
06/12/2023	Transcript received - transcript of 12/15/2021 hearing		 Image
06/13/2023	JUDGMENT pursuant to MRCP 54(b), the Court ORDERED separate and final Judgment. Therefore, it is ORDERED and ADJUDGED that the Complaint of the Plaintiff(s), Eric Salmonsens and hereby is dismissed against Defendant(s), Twenty One Corp. Doing Business as Yong Shing Restaurant with statutory costs. Entered and Copies mailed 6/13/23	33	 Image
06/14/2023	Notice of appeal filed. Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff) (notices with copy of notice of appeal mailed 6/22/2023)	34	 Image
06/14/2023	Certification/Copy of Letter of transcript ordered from Court Reporter 12/16/2021 02:00 PM Rule 56 Hearing Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff)	34.1	 Image
06/20/2023	Notice of appeal filed. Applies To: McMaster, Esq., John J (Attorney) on behalf of Salmonsens, Eric (Plaintiff) (notices with copy of notice of appeal mailed 6/22/2023)	35	 Image
06/23/2023	Pursuant to Mass. R. App. P. 8 (b)(3), the parties are hereby notified that all transcripts have been received by the clerk's office and that the record will be assembled pursuant to Mass. R. Civ. P. 9(e).		
Case Disposition			
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	
Pending			

Addendum E

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1885CV0630-D

ERIC SALMONSEN,
Plaintiff

v.

ERIN HUBBELL and
TWENTY-ONE CORP., d/b/a
YONG SHING RESTAURANT,
Defendants

**DEFENDANT TWENTY-ONE CORP., D/B/A YONG SHING RESTAURANT'S
RULE 9A(b)(5) STATEMENT OF MATERIAL FACTS**

1. On March 24, 2017, and at all times relevant to this matter, Michael Chao was the president of Twenty-One Corp. and owner of Yong Shing Restaurant located at 90 Auburn Street, Auburn, MA (See Twenty-One Corp.'s Answer to the Plaintiff's First Amended Complaint, attached hereto as Exhibit 1)

Plaintiff's Response¹

Not disputed

2. Yong Shing has a maximum seating capacity of 160 people. (See the deposition of Michael Chao, page 16, lines 3-5 attached as Exhibit 2)

Plaintiff's Response

Not disputed

3. Yong Shing has a bar area with counter seating for 18 and five stool and four tables on the backside. (See the deposition of Michael Chao, page 16, lines 3-5 and page 17, lines 1-5 attached as Exhibit 2).

Plaintiff's Response

Not disputed

¹ Plaintiff's responses are for the purposes of this motion, only.

4. As of March 24, 2017, Loo Meng Cheah, (hereafter “Randy”) had worked at Yong Shing for about 20-25 years working his way up from waiter to head bartender. (See the Deposition of Loo Meng Cheah, page 5, lines 18-19 and 10, lines 10-21 attached hereto as Exhibit 3).

Plaintiff’s Response

Not disputed

5. In March 2017, Yong Shing typically had two sometimes three bartenders and three servers working in the bar area of the restaurant on Friday nights from 4:00 pm to 1:00 am. See the deposition of Michael Chao, page 18, lines 19-24 and page 19, lines 1-4 attached as Exhibit 2).

Plaintiff’s Response

Not disputed

6. On March 24, 2017, Randy held a current Training for Intervention Procedures “TIPS” certificate and had renewed his certification several times over the years. (See the Deposition of Loo Meng Cheah, page 9, lines 21-24 and page 10, lines 1-9 attached hereto as Exhibit 3)

Plaintiff’s Response

Not disputed

7. On or about March 24, 2017, Erin Hubbell and Jessica Melanson were co-owners of The Yankee Diner in Charlton, Massachusetts. (See the Deposition of Erin Hubbell, page 7, lines 6-18, attached hereto as Exhibit 4)

Plaintiff’s Response

Not disputed

8. On Friday, March 24, 2017, Ms. Hubbell worked at the diner that morning shift from 6:00 am to 2:00 pm, then she closed the diner at 2:00 then prepped for dinner and reopened the diner for dinner hours from 5:00pm to 8:00 pm. (See the Deposition of Erin Hubbell, page 9, lines 23, page 10, lines 1-4, attached hereto as Exhibit 4)

Plaintiff’s Response

Not disputed that the defendant testified to this information.

9. On March 24, 2017, Hubbell and Melanson closed the diner at approximately 7:15-7:30 p.m. (See the Deposition of Erin Hubbell, page 10, lines 5-8, attached hereto as Exhibit 4)

Plaintiff’s Response

Not disputed

10. Hubbell and Melanson decided to go to Yong Shing Restaurant for a drink and some appetizers after work each driving separate cars. (See the Deposition of Erin Hubbell, page 10, lines 9-18, attached hereto as Exhibit 4)

Plaintiff's Response

Not disputed that they went to the bar for drinks.

11. They arrived at Yong Shing Restaurant at about 8:00 pm on March 24, 2017. (See the Deposition of Erin Hubbell, page 10, lines 22-24, attached hereto as Exhibit 4)

Plaintiff's Response

Not disputed

12. On March 24, 2017, Ms. Hubbell was not intoxicated upon her arrival at Yong Shing. (See Twenty-One Corp.'s Answer to the Plaintiff's First Amended Complaint, ¶¶ 16-25 attached hereto as Exhibit 1)

Plaintiff's Response

Not disputed that the plaintiff testified to this issue. However, additional facts in the plaintiff's memorandum will create a genuine issue as to the accuracy of that statement. See exhibits 7-12.

13. Randy was working at the bar at Yong Shing on the night of March 24, 2017. (See the Deposition of Loo Meng Cheah, pages 16 and 17 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed

14. On the night of March 24, 2017, there was seating at the bar for 16 people. (See the Deposition of Loo Meng Cheah, pages 52, line 17-24 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed

15. Randy, the bartender at Yong Shing was familiar with Erin Hubbell as she was a regular customer as of March 24, 2017. (See the Deposition of Loo Meng Cheah, page 17, lines 3-5 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed

16. Randy knew Erin Hubbell was not the type of person that would get drunk on one glass of wine. (See the Deposition of Loo Meng Cheah, page 33, lines 9-11 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

17. On March 24, 2017, Jessica ordered a Mai tai and Erin ordered a glass of wine. (See the Deposition of Erin Hubbell, page 11, lines 1-8)

Plaintiff's Response

Disputed. See Exhibit 7, Auburn Police arrest report, page 3:

As the Auburn Fire Department was rendering medical care to **SALMONSEN**, I spoke with **HUBBELL**. I immediately detected a strong odor of an alcoholic beverage coming from her breath, slurred speech, blood shot glassy eyes, and appeared to be unsteady on her feet. I asked her if she had been drinking tonight, and she stated "yes". She further stated that she was coming from the Yong Shing. When I asked her how many drinks she had, she stated "glass of wine and a Mii Tai". She stated that she "shouldn't have been driving". I then asked her if she was driving, and if there was anyone else in the vehicle. She stated that she was the only one in the car and she was driving.

See also Exhibit 5, deposition of Officer Kaperonis:

0718Kaperonis_Spiros, (Page 13:6 to 13:20)
13
6 Q. Okay. And then you talk about your
7 conversation where she admitted to drinking that
8 night?
9 A. Yes.
10 Q. And she told you she was coming from the
11 Yong Shing; is that correct?
12 A. Yes.
13 Q. What did she tell you about how much she
14 had to drink at the Yong Shing?
15 A. She had mentioned -- she had stated she
16 had a glass of wine and a Mai Tai.
17 Q. Okay. What other statement did she make
18 that you recorded?
19 A. She shouldn't have been driving, quote,
20 unquote.

18. Erin had a glass of wine; Jessica had her Mai tai. Erin has a few teriyakis sticks and had nothing else. (See the Deposition of Erin Hubbell, page 15, line 4-8, attached hereto as Exhibit 4)

Plaintiff's Response

Disputed. See Exhibit 7, Auburn Police arrest report, page 3:

As the Auburn Fire Department was rendering medical care to **SALMONSEN**, I spoke with **HUBBELL**. I immediately detected a strong odor of an alcoholic beverage coming from her breath, slurred speech, blood shot glassy eyes, and appeared to be unsteady on her feet. I asked her if she had been drinking tonight, and she stated "yes". She further stated that she was coming from the Yong Shing. When I asked her how many drinks she had, she stated "glass of wine and a Mii Tai". She stated that she "shouldn't have been driving". I then asked her if she was driving, and if there was anyone else in the vehicle. She stated that she was the only one in the car and she was driving.

See also Exhibit 5, deposition of Officer Kaperonis:

0718Kaperonis_Spiros, (Page 13:6 to 13:20)

13

6 Q. Okay. And then you talk about your
7 conversation where she admitted to drinking that
8 night?

9 A. Yes.

10 Q. And she told you she was coming from the
11 Yong Shing; is that correct?

12 A. Yes.

13 Q. What did she tell you about how much she
14 had to drink at the Yong Shing?

15 A. She had mentioned -- she had stated she
16 had a glass of wine and a Mai Tai.

17 Q. Okay. What other statement did she make
18 that you recorded?

19 A. She shouldn't have been driving, quote,
20 unquote.

19. On March 24, 2017, Randy put six (6) ounces of wine in Erin Hubbell glass. (See the Deposition of Loo Meng Cheah, page 41 lines 3-5 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that he testified to this information.

20. On March 24, 2017, Erin came in with her friend Jessica. He gave her wine. Erin didn't seem any different, like intoxicated or anything like that. (See the Deposition of Loo Meng Cheah, page 16, lines 17-24 and page 17 1-2 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

21. Randy recalled that on the night in question Hubbell came into the bar with her friend Jessica, and that Hubbell "seemed fine", not intoxicated, she "spoke fine", "she act fine".

(See the Deposition of Loo Meng Cheah, page 16, lines 17-24 and page 17 1-2 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

22. The sale receipt from Yong Shing dated March 24, 2017. (See receipt authenticated by the deponent and marked as Exhibit 4 by plaintiff's counsel at the deposition of Michael Chao, page 36, line 24 and page 37, lines 1-14 attached hereto as Exhibit 2) The receipt attached here as Exhibit 2A

Plaintiff's Response

Not disputed.

23. Ms. Hubbell did not have more than one glass of wine while at Yong Shing. (Deposition of Erin Hubbell, page 16 Lines 6-8, attached hereto as Exhibit 4 and See Twenty-One Corp.'s Answer to the Plaintiff's First Amended Complaint, ¶ 16-25 attached hereto as Exhibit 1)

Plaintiff's Response

Disputed. See Exhibit 7, Auburn Police arrest report, page 3:

As the Auburn Fire Department was rendering medical care to **SALMONSEN**, I spoke with **HUBBELL**. I immediately detected a strong odor of an alcoholic beverage coming from her breath, slurred speech, blood shot glassy eyes, and appeared to be unsteady on her feet. I asked her if she had been drinking tonight, and she stated "yes". She further stated that she was coming from the Yong Shing. When I asked her how many drinks she had, she stated "glass of wine and a Mii Tai". She stated that she "shouldn't have been driving". I then asked her if she was driving, and if there was anyone else in the vehicle. She stated that she was the only one in the car and she was driving.

See also Exhibit 5, deposition of Officer Kaperonis:

0718Kaperonis_Spiros, (Page 13:6 to 13:20)
13
6 Q. Okay. And then you talk about your
7 conversation where she admitted to drinking that
8 night?
9 A. Yes.
10 Q. And she told you she was coming from the
11 Yong Shing; is that correct?
12 A. Yes.
13 Q. What did she tell you about how much she
14 had to drink at the Yong Shing?
15 A. She had mentioned -- she had stated she
16 had a glass of wine and a Mai Tai.

17 Q. Okay. What other statement did she make
18 that you recorded?
19 A. She shouldn't have been driving, quote,
20 unquote.

See Exhibit 11 – plea hearing for Erin Hubbell:

2018 03 14 hubbell, (Page 5:3 to 5:24)

5

3 He asked her if she was drinking that
4 night. She said yes and that she had just come
5 from Yong Shing. He asked her how many drinks
6 had she had. She stated that she had a glass of
7 wine and a Mai Tai. She stated that she should
8 not have been driving at that point. She did
9 admit to driving the motor vehicle.

19 THE COURT: Did you hear what the
20 prosecutor just said?

21 MS. HUBBELL: I did.

22 THE COURT: Is that basically what
23 happened?

24 MS. HUBBELL: Yes.

Further, exhibit 2 shows a purchase of alcohol only, no food. Ms. Hubbell ended up meeting a group of regulars at the bar who could have provided her additional drinks – a violation of Yong Shing's rules: See exhibit 3

0724Cheah_Loo Meng, (Page 50:1 to 50:16)

50

1 You mentioned when Ms. Hubbell came
2 in that night on March 24, 2017, she was talking to
3 other people at the bar that she knew; is that
4 correct?

5 A. Yes, that's correct.

6 Q. Who were the other regulars that she was
7 talking to?

8 A. There's a whole bunch of them. There's a
9 lot of people at the bar, but I don't particularly
10 remember who they are. But I know one of them is
11 John and then -- and then she came in with Jessica,
12 and then they just hang out in the front of the bar
13 with a whole bunch of people.

14 Q. Okay. And you don't know who the other
15 bunch of people are?

16 A. I don't quite particularly remember.

0724Cheah_Loo Meng, (Pages 61:24 to 62:12)

61

24 Q. The 3-24-17 when she -- you said she was

62

1 in the front of the bar talking to a bunch people.

2 You don't remember who the people are?

3 A. Not remember.

4 Q. Okay. Was Jessica with her when they were

5 talking?

6 A. Yes, Jessica -- Jessica, yes.

7 Q. Okay. Was she standing in the same group

8 of people, or did she float off?

9 A. She on and off.

10 Q. Okay. And she carried around her Mai Tai,

11 or did she leave it on the bar?

12 A. I don't quite remember.

24. Jessica, Ms. Hubbell's friend at the Yong Shing Restaurant on March 24, 2017, was served one Mai tai. (See the Deposition of Erin Hubbell, page 12 Lines 22 and 23, attached hereto as Exhibit 4)

Plaintiff's Response

Not disputed that this was the testimony.

25. On March 24, 2017, Randy estimated that including patrons at the tables/booths, there were between 40 and 50 people in the bar area that night. (See the Deposition of Loo Meng Cheah, page 72, lines 3-7 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed.

26. On March 24, 2017, Randy looked around the bar a few times while working and saw Hubbell a few times but did not see that she was acting like she was intoxicated. (See the Deposition of Loo Meng Cheah, page 21, lines 18-24, page 22, lines 1-4, and lines 18-24, page 23, lines 1-5 and Page 24, lines 8-10 attached hereto as Exhibit 3).

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

27. While at the bar Randy observed Erin Hubbell talking other people that she knew, one of them was John and they just hung out in the front of the bar. (See the Deposition of Loo Meng Cheah, page 50, lines 1-13 attached hereto as Exhibit 3).

Plaintiff's Response

Not disputed that there was testimony that she was with a group of regulars.

0724Cheah_Loo Meng, (Page 50:1 to 50:16)

50

1 You mentioned when Ms. Hubbell came
2 in that night on March 24, 2017, she was talking to
3 other people at the bar that she knew; is that
4 correct?

5 A. Yes, that's correct.

6 Q. Who were the other regulars that she was
7 talking to?

8 A. There's a whole bunch of them. There's a
9 lot of people at the bar, but I don't particularly
10 remember who they are. But I know one of them is
11 John and then -- and then she came in with Jessica,
12 and then they just hang out in the front of the bar
13 with a whole bunch of people.

14 Q. Okay. And you don't know who the other
15 bunch of people are?

16 A. I don't quite particularly remember.

0724Cheah_Loo Meng, (Pages 61:24 to 62:12)

61

24 Q. The 3-24-17 when she -- you said she was

62

1 in the front of the bar talking to a bunch people.
2 You don't remember who the people are?

3 A. Not remember.

4 Q. Okay. Was Jessica with her when they were
5 talking?

6 A. Yes, Jessica -- Jessica, yes.

7 Q. Okay. Was she standing in the same group
8 of people, or did she float off?

9 A. She on and off.

10 Q. Okay. And she carried around her Mai Tai,
11 or did she leave it on the bar?

12 A. I don't quite remember.

28. Randy saw Erin Hubbell talking a person named John, who came into the bar fairly regularly, who was a police officer named John McLean. (See the Deposition of Loo Meng Cheah, page 54, lines 22-23 and Page 55, lines 1-11 attached hereto as Exhibit 3.

Plaintiff's Response

Not disputed that this was the testimony.

29. When Randy saw Erin talking to Officer McLean, she did not show any signs of intoxication. (See the Deposition of Loo Meng Cheah, Page 55, lines 12-21 attached hereto as Exhibit 3.)

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

30. On the night of March 24, 2017, Randy did not see any evidence that Erin Hubbell took a drink from any other customer that night (See the Deposition of Loo Meng Cheah, page 72, lines 8-12 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

31. Randy, watched Erin Hubbell walk toward the lobby of the bar where it exits into the lobby with Officer John McLean and "at that point she did not appear to show any signs of intoxication". (See the Deposition of Loo Meng Cheah, page 55, line 22-24 and Page 56, lines 1-19 attached hereto as Exhibit 3).

Plaintiff's Response

Not disputed that the deponent testified to his opinion.

32. Jessica and Erin Hubbell left Yong Shing at the same time and each got into their own cars. (See the Deposition of Erin Hubbell, page 13, lines 14-20 attached hereto as Exhibit 4)

Plaintiff's Response

Not disputed.

33. Eric Salmonsens, the plaintiff, is a resident of Worcester, Massachusetts who on March 24, 2017, was operating a motor vehicle in a westerly direction on Auburn Street, Auburn, Massachusetts at approximately 8:55 pm. (See Plaintiff's Amended Complaint)

Plaintiff's Response

Not disputed.

34. Erin Hubbell got into her car and drove in an easterly direction on Auburn Street, Auburn Massachusetts (See Plaintiff's Amended Complaint)

Plaintiff's Response

Not disputed.

35. The last thing that Erin recalled before the crash was.... she leaned over and was feeling around in her pocketbook, crossed the double yellows onto the wrong side of the road and struck the vehicle driven by the plaintiff. (See the Deposition of Erin Hubbell, page 17, lines 6-14 attached hereto as Exhibit 4)

Plaintiff's Response

Not disputed that Ms. Hubbell drove her vehicle onto the wrong side of the road and struck Mr. Salmonsens's vehicle in a head-on fashion. See Exhibit 8, the police crash report.

As for the issue of leaning over to get her cell phone, there is no mention of that in the arrest report (Exhibit 7), the crash report (Exhibit 8), in the booking video (Exhibit 9), or her plea colloquy (Exhibit 11). Ms. Hubbell claims that the plaintiff drove onto the wrong side of the road and struck her vehicle (Exhibit 9, approximately 21:33 minutes).

- 36. Approximately one week later, Randy was told that Erin Hubbell was involved in a car accident by another bar regular, Spiros and that she was not charged with DUI. He said he found some nips in the car. (See the Deposition of Loo Meng Cheah, page 14, lines 20-24 and Page 15, lines 1-24 and page 16, lines 1-5 attached hereto as Exhibit 3)

Plaintiff's Response

Not disputed that the bartender testified to a conversation. See Exhibit 10 – Criminal Docket – Admission to Sufficient facts for OUI-L causing serious bodily injury and Exhibit 11 – Plea hearing transcript.

- 37. Michael Chao was not aware of the incident giving rise to the plaintiff's complaint until he received a letter from plaintiff's counsel notifying him of the potential claim. See the deposition of Michael Chao, page 15, line 15-22 attached as Exhibit 2)

Plaintiff's Response

Not disputed that he testified as such. However, Mr. Choa (Rule 30(b)(6) representative also testified that his manager knew of the incident prior to the receipt of the letter. See Exhibit 2:

0724Chao_Michael, (Pages 37:19 to 38:3)
37
19 Q. Okay. How do we know this is
20 Ms. Hubbell's receipt?
21 A. Because when I received the letter, so I
22 went to talk to Randy, know anything about it. So
23 Randy told me he already know did the accident
24 because he -- the police came and talked to him.
38
1 Police is regular customer, too. That's why I ask
2 him, and he know what I talking about, and he
3 printed the receipt for me.

44
11 Q. Okay. You said Mr. Cheah was the head
12 bartender that night?
13 A. Yes.
14 Q. Is he a manager? Is that his title?
15 A. Yes. Since I moved to the new location.

38. Officer Spiros Kaperonis was called for a car crash at approximately 8:55 pm on March 24, 2017. (See the Deposition of Officer Spiros Kaperonis, page 6, lines 10-13 attached hereto as Exhibit 5)

Plaintiff's Response

Not disputed.

39. Officer Spiros Kaperonis formed the opinion that Erin Hubbell was operating her motor vehicle while under the influence of alcohol. (See the Deposition of Officer Spiros Kaperonis, page 14, lines 2-6 attached hereto as Exhibit 5).

Plaintiff's Response

Not disputed.

40. At the scene Erin Hubbell refused a field sobriety and breathalyzer test. (See the Deposition of Officer Spiros Kaperonis, page 13, lines 21-24 and page 17, lines 22-23 attached hereto as Exhibit 5).

Plaintiff's Response

Not disputed.

41. At the scene of the "car crash" Auburn Police Officer Chipman (who also responded to the scene) recovered two 50ml bottles of Dr. McGillicuddy's which is 24% alcohol by volume from Ms. Hubbell's car. (See exhibits attached and incorporated by reference in Plaintiff's Original, First and Second Amended Complaint)

Plaintiff's Response

Not disputed, but see exhibit 12 where Officer Chipmen testified:

0622Chipman_Keith, (Pages 12:15 to 13:8)

12

15 Q. Did someone do a search of the vehicle?

16 A. Yes, I did.

17 Q. That was you?

18 A. Correct.

19 Q. Could you tell us about that, please?

20 A. The vehicle was, stuff was thrown all over,
21 but I located two small, 50 milliliter size, ah,
22 containers, commonly referred to as nips, one shot
23 of Doctor McGillicuddy's bottles inside the center
24 console, one was empty and one was full.

13

1 Q. And you say inside the center console; was
2 the console closed?

3 A. I believe it was.

4 Q. Did you find any indication that she may
5 have been drinking from those bottles just prior to
6 the crash?

7 MR. O'ROURKE: Objection.

8 A. I did not.

42. On March 24, 2017, Erin Hubbell was charged with driving offenses including violation of M.G.L Ch. 90, 24L/D OUI-Liquor, and M.G.L Ch 90 section 24, possession of open container of alcohol in motor vehicle. (See exhibits attached and incorporated by reference to the Plaintiff's Original and First Amended Complaints Court Docket no.: 1 and 12.)

Plaintiff's Response

Not disputed.

43. The plaintiff, Eric Salmonsens, himself, knows no facts to support the claim that Yong Shing overserved Ms. Hubbell on March 24, 2017. (See the Deposition Excerpt of Eric Salmonsens, page 147 lines 23-24, page 148, lines 1-24 and page 149 lines 1-2 attached hereto as Exhibit 6).

Plaintiff's Response

Not disputed.

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

Worcester Superior Court
Civil Action No. 1885CV0630-D

<p>Eric Salmonsens <i>Plaintiff</i></p> <p>v.</p> <p>Erin Hubbell and Twenty One Corp <i>Defendants</i></p>

**Plaintiff’s Memorandum in Opposition to
Twenty One Corp’s Motion for Summary Judgment**

Now comes the plaintiff and moves this Honorable Court to deny the defendant’s motion as there exists a genuine issue of material fact on both counts, the dram shop count and the negligent security/failure to follow their internal rules count.

Basic Additional Facts of the Crash

On March 24, 2017, Ms. Hubbell went into the bar at Yong Shing and consumed at least one drink. (Exhibit 4, pages 10-11). Ms. Hubbell later told the police, and the court in her plea hearing, that she drank a glass of wine and a Mai Tai. (Exhibit 5, page 13). She closed her tab at 8:44 pm, but it is unclear when she left the bar or if she had other drinks that were not on the tab. (Exhibit 2A). She was seen prior to the closing of her tab with a group of regulars in another part of the bar.

The Auburn police received a call at 8:55 pm, 11 minutes after closing her tab, of an automobile crash. (Exhibit 8). The crash occurred near 185 Auburn Street, Auburn. (Exhibit 8). The Yong Shing is located at 90 Auburn Street, Auburn. (Exhibit 2, page 10 line 19).

At the scene, Ms. Hubbell stated, (Exhibit 5, deposition of Officer Kaperonis):

0718Kaperonis_Spiros, (Page 13:6 to 13:20)

13

6 Q. Okay. And then you talk about your
7 conversation where she admitted to drinking that
8 night?

9 A. Yes.

10 Q. And she told you she was coming from the
11 Yong Shing; is that correct?

12 A. Yes.

13 Q. What did she tell you about how much she
14 had to drink at the Yong Shing?

15 A. She had mentioned -- she had stated she
16 had a glass of wine and a Mai Tai.

17 Q. Okay. What other statement did she make
18 that you recorded?

19 A. She shouldn't have been driving, quote,
20 unquote.

During her plea hearing, she stated, (Exhibit 11)

2018 03 14 hubbell, (Page 5:3 to 5:9)

5

3 He asked her if she was drinking that
4 night. She said yes and that she had just come
5 from Yong Shing. He asked her how many drinks
6 had she had. She stated that she had a glass of
7 wine and a Mai Tai. She stated that she should
8 not have been driving at that point. She did
9 admit to driving the motor vehicle.

19 THE COURT: Did you hear what the
20 prosecutor just said?

21 MS. HUBBELL: I did.

22 THE COURT: Is that basically what
23 happened?

24 MS. HUBBELL: Yes.

Ms. Hubbell testified her last drink was at the Yong Shing, and that she did not drink from any open containers of alcohol found in her automobile, (Exhibit 4)

0810Hubbell_Erin, (Pages 14:19 to 15:03)

14

19 Q. All right. The question I have is, from

20 the time you left the Yong Shing to the mile or so
21 down the street from the crash, did you drink
22 anything from either of those bottles?

23 A. I did not.

24 Q. Okay. So according to your plea hearing
15

1 the last place you had a drink was at the Yong
2 Shing; is that correct?

3 A. Correct.

Officer Kaperonis formed the opinions that she was under the influence of intoxicating liquors and that she was visibly intoxicated, (Exhibit 5, page 12, line 6 to page 13, line 5 below and exhibit 7 – Arrest report.)

0718Kaperonis_Spiros, (Pages 12:6 to 13:5)

12

6 I'm looking at Page 1 of the narrative,
7 which I think is Page 3 of the exhibit. Down one,
8 two -- fifth paragraph, you talk about having a
9 strong odor of alcoholic beverage from her breath;
10 is that correct?

11 A. Yes.

12 Q. Slurred speech?

13 A. Yes.

14 Q. Do you remember what she said that made
15 you think that her speech was slurred?

16 A. I don't recall our conversation.

17 Q. I know it's been a year-and-a-half.

18 A. Yeah.

19 Q. But -- and glassy eyes. And then it says,
20 appeared to be unsteady on her feet. So at some
21 point she would have exited the white Chevy
22 Traverse?

23 A. Yes.

24 Q. All right. Can you tell me what you

13

1 observed that made you believe she was unsteady on
2 her feet.

3 A. I don't really get into it too much on my
4 report, but obviously when she got out, she must
5 have stumbled, you know.

Ms. Hubbell was charged with and admitted to sufficient facts to OUI-L causing Serious

Bodily Injury and Operating a Motor Vehicle Negligently so as to Endanger the Lives and Safety of the Public. (Exhibit 10).